IN THE

Supreme Court of the United States

October Term, 1969

No. 188

ROBERT BALDWIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

Appeal from the Court of Appeals of the State of New York

BRIEF FOR APPELLEE

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Preliminary Statement

This is an appeal from a judgment of the New York Court of Appeals, entered March 6, 1969 (App. 23),* which affirmed an order of the Appellate Term of the New York Supreme Court, First Department, entered January 10, 1969, affirming a judgment of conviction rendered on September 3, 1968 in the Criminal Court of the City of New York. Appellant was convicted after trial of the crime of jostling [N.Y. Penal Law §165.25] and was sentenced to a term of imprisonment of one year.

* References "App." are to the separate appendix filed pursuant to Rule 36.

Jurisdiction—Review Should Be by Certiorari, Not Appeal

On April 8, 1969, appellant's appeal from the judgment of the New York Court of Appeals was docketed in this Court, appellant challenging the constitutionality of Section 40 of the New York City Criminal Court Act, which provides that all trials in the court shall be without a jury. Appellee filed a motion to affirm, but on June 2, 1969, probable jurisdiction was noted.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(2). However, this case does not, as is required by that section, necessarily call for review of the constitutionality of the New York statute. Whether or not Robert Baldwin's conviction may be sustained under the Sixth and Fourteenth Amendments, there would be no constitutional requirement that trials in the New York City Criminal Court be held with a jury. The state could still constitutionally provide that if the defendant wished a jury trial, his case should be transferred to another court, as has been provided by Congress for federal misdemeanors in the Federal Magistrates Act of 1968. 18 U.S.C. §3401. There is no legislation authorizing a jury trial in the New York City Criminal Court, no procedural machinery for such a trial, and no constitutional requirement that such trials be held in that specific court, whatever the scope of the Sixth and Fourteenth Amendments. Accordingly, this Court should dismiss appellant's appeal, but treating the papers as a petition for certiorari, should grant certiorari. *Garrity v. New Jersey*, 385 U.S. 493, 495-496 (1967); compare *Puryear* v. *Hogan*, no. 336 Misc., *appeal dismissed* (Oct. 13, 1969).

Questions Presented

1. Do the Sixth and Fourteenth Amendments require a jury trial in New York State for offenses with a maximum penalty of one year's imprisonment?

2. Does the limitation of six-man juries to misdemeanor trials conducted outside of New York City deprive an accused misdemeanant in New York City of the equal protection of the laws?

Statement of the Case

In the evening of August 10, 1968, Patrolman Joseph Crowley of the Port of New York Authority Police was on duty in the Port of New York Authority Bus Terminal in Manhattan. At about 9 p.m., from a balcony overlooking a busy escalator, he noticed appellant Robert Baldwin and one Arthur Bethea on the descending escalator. Bethea moved right beside a woman and made "a body contact" with her, while appellant moved behind her, to her left (App. 13). As Bethea turned toward the left, appellant opened her pocketbook, which she carried by a strap (App. 11, 13), and removed some loose money (App. 8-9). Crowley and a fellow officer left the balcony and arrested appellant and Bethea, finding a ten-dollar bill in appellant's possession (App. 9, 10).

A complaint alleging the misdemeanor of jostling [N.Y. Penal Law §165.25] was filed in the New York City Criminal Court (App. 1). The request of the two defendants for a jury trial was denied (App. 7), but the defendants did not invoke their statutory right to a three-judge bench. See N.Y.C. Crim. Ct. Act §40. After a trial before a judge of the Criminal Court on August 26, 1968, appellant

and Bethea were convicted as charged, and on September 3, 1968, they were sentenced to serve one year in the New York City correctional institution, the court taking note of appellant's long criminal record, including convictions for auto theft, assault, burglary and larceny (App. 20). Only appellant Baldwin appealed from the judgment. After affirmance by the Appellate Term, First Department, of the New York Supreme Court (App. 22), leave to appeal to the New York Court of Appeals was granted by Chief Judge Fuld. In that court appellant contended only that he was constitutionally entitled to a jury trial under the Sixth Amendment and the equal protection clause of the Fourteenth Amendment. The conviction was affirmed in an opinion by Associate Judge Scileppi (App. 25), two judges dissenting (App. 36).

Summary of Argument

Appellant, who was convicted without a jury trial of the misdemeanor of jostling, and sentenced to one year's imprisonment, the maximum penalty for a misdemeanor in New York, claims that he was entitled to a jury trial under the Sixth and Fourteenth Amendments because his offense was a "serious" crime. In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court held that a defendant who is tried in a state court for a "serious" offense has the right to a trial by jury, but the Court left open the question whether a crime punishable by a maximum term of imprisonment of one year is a serious offense under the Sixth Amendment. Appellant Baldwin discerns a maximum cutoff of six months' imprisonment dividing serious and petty offenses. However, the determination as to cutoff, as this Court has stated, must be based upon objective indications of the seriousness with which the community judges the

offense, and the objective evidence as to seriousness of crimes in contemporary American criminal law shows clearly that the suitable cutoff separating serious and petty offenses is a maximum term of imprisonment of one year, not six months.

It is well settled, for example, that "infamous" crimes, prosecutable by indictment by virtue of the Fifth Amendment, are crimes punishable by more than one year's imprisonment, or imprisonment at hard labor, or in a state or federal penitentiary. These penalties are reserved in New York State for felonies, misdemeanors being sharply distinguished from felonies as minor offenses. Further, all states and the federal system of criminal justice classify crimes as felonies and misdemeanors, and in the majority of states, and the federal system, misdemeanors are crimes whose maximum penalty of imprisonment is one year, a six-month boundary appearing in only a few states. Similarly, the one-year punishment is served in a local jail in twenty-~~three~~ two states, including New York, only felons being liable to a state penitentiary sentence. In addition, New York and the majority of the other states reserve serious collateral consequences, such as disenfranchisement, for felonies punishable by a maximum penalty greater than one year. Plainly, the treatment of crimes in contemporary American jurisprudence establishes a clear boundary between serious and petty offenses, turning on the one-year maximum penalty of imprisonment for the lesser crimes.

The validity of the New York system, with its one-year cutoff, is confirmed by provisions for jury trial in the various states. The jury trial contemplated by the federal constitution is a jury of twelve persons rendering a unani-

mous verdict at a trial in the first instance, not a trial *de novo*. In 13 states from coast to coast, no such jury is provided for crimes carrying a maximum penalty of imprisonment of one year; nevertheless, reviewing provisions for jury trials in the states, this Court noted in *Duncan* that the application of Sixth Amendment principles to trials in state courts would have no widespread effect on state procedures, and supported this conclusion with evidence that in very few states is a common law jury withheld for crimes punishable by more than one year's imprisonment. The limitation of common law juries to trials of offenses punishable by more than one year is substantial evidence that misdemeanors with a one-year maximum sentence are not considered serious crimes warranting a constitutionally required jury trial. By contrast, only six states provide a Sixth Amendment jury trial for crimes with a maximum penalty of six months' imprisonment, the cutoff which appellant proposes. Moreover, the highest courts of New York and New Jersey, states whose constitutions contain provisions for trial by jury similar to the Sixth Amendment, based upon similar Colonial and common law background, have determined that a one-year maximum penalty does not render an offense serious.

Appellant also claims denial of the equal protection of the laws under the Fourteenth Amendment, because a six-man "jury" is available for misdemeanor trials held outside of New York City only. No invidious discrimination is shown, however, by this reasonable territorial division. This Court has frequently upheld similar geographical distinctions drawn by state legislatures, in cases involving jury trial procedures, admissibility of evidence, criminal appeals, and preliminary hearings. Contemporary juris-

prudence reflects many instances in which cities or populous counties are singled out for separate treatment in the provisions for jury trials, or other criminal procedures.

Far from an irrational, hostile classification, withholding six-man jury trials from the New York City Criminal Court is rationally designed to reduce the enormous expense, delays, and congestion associated with the administration of justice in that court. New York City's unique crime-engendering problems are reflected in its criminal court case load, a burden 39 times as great as that in the next largest city in the state, far out of proportion to the difference in population. Such considerations are material in determining the reasonableness of state laws which limit jury trials to serious offenses. *Duncan* v. *Louisiana, supra* at 160.

Without suggesting that appellant's constitutional claims are correct, we note that a question of retroactivity would be raised if appellant's arguments were accepted. *Duncan* v. *Louisiana* is not retroactive, and the same result would presumably obtain here, a holding in appellant's favor in this case being applied only to him, and to defendants whose trials had not yet begun on the date of the decision in the present case. Retroactivity would not be required by the purpose of a Sixth Amendment or equal protection ruling in appellant's favor, there being no impairment of the integrity of the fact-finding process without a jury trial. But retroactivity would cause substantial disruption of the administration of justice in a court already overloaded. Moreover, it would ignore the justified reliance of state officers on the validity of the New York system, a reliance which was encouraged by the opinion in *Duncan*.

POINT I

The Sixth Amendment does not require a jury trial in New York State for offenses with a maximum penalty of imprisonment of one year.

A. Whether a misdemeanor, punishable by up to one year's imprisonment, is a serious crime requiring a jury trial is to be determined by objective criteria of seriousness.

Under a statutory scheme dating back to the common law and the Colonies and accepted for two centuries, trials in the New York City Criminal Court, which has jurisdiction to try all misdemeanors committed in New York City, take place without a jury. N.Y.C. Crim. Ct. Act §40. Trials of misdemeanors in the Criminal Court are normally conducted before one judge, but in most cases either party may demand a three-judge bench. *Ibid.* In addition, the defendant may ask a justice of the Supreme Court, the superior criminal court, to order that the case be prosecuted by indictment and tried by a twelve-man jury in the Supreme Court, a matter resting in the court's discretion. N.Y.C. Crim. Ct. Act §32.

There are two classes of misdemeanors in New York, punishable differently. A Class A misdemeanor, of which appellant was convicted, carries a maximum sentence of imprisonment of one year, while the maximum imprisonment for a Class B misdemeanor is three months. N.Y. Penal Law §70.15. The court may, in the alternative, place the convicted Class A misdemeanant on probation for up to three years, the Class B misdemeanant for one year,

or may order a sentence of unconditional discharge, comparable to a suspended sentence. N.Y. Penal Law §§65.00, 65.05. A defendant sentenced to imprisonment for one year is entitled to credit for good behavior in jail, so that in most cases the actual term of imprisonment is reduced to ten months. N.Y. Penal Law §70.30(4)(b); N.Y. Correction Law §304. Appellant Baldwin, for example, was released after ten months' imprisonment, dating from his original confinement upon arrest. *Cf.* N.Y. Penal Law §70.30(3).

In *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), this Court held

> "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Id.* at 149.

The Sixth Amendment right to a jury trial, the court reminded, applies only to "serious crimes" and not to "petty offenses." See also *Schick* v. *United States,* 195 U.S. 65, 70 (1904); *District of Columbia* v. *Clawans,* 300 U.S. 617, 628 (1937). While declining to "settle the exact location of the line between petty offenses and serious crimes," *Duncan* v. *Louisiana, supra* at 161, the Court has offered guidelines. In its most recent pronouncement on the subject, the Court stated, in an opinion by Mr. Justice MARSHALL:

> "In determining whether a particular offense can be classified as 'petty,' this Court has sought objective indications of the seriousness with which society regards the offense. • • • The most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission." *Frank* v. *United States,* 395 U.S. 147, 148 (1969).

The Court has held that "a six-month sentence is short enough to be petty." *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968); *Duncan* v. *Louisiana, supra* at 159; *Frank* v. *United States, supra* at 150. Moreover, a sentence of probation for three years—available in New York State for a Class A misdemeanor—does not entitle the defendant to a jury trial under the Constitution. *Frank* v. *United States, supra.*

Appellant Baldwin contends that six months' imprisonment is the most that may be prescribed without a jury trial (appellant's brief, pp. 8-9, 14-16). However, a six-month cutoff would be unsupported by substantial objective evidence of seriousness. In referring to such "objective criteria" in the *Duncan* case, this Court made reference to federal and state laws defining petty offenses, but undertook no detailed examination, since it was sufficient in *Duncan* to hold that based on present standards in this country a crime punishable by two years' imprisonment was a serious crime. A more comprehensive examination of state and federal laws, undertaken by appellee, shows that in contemporary American criminal law, a maximum sentence of one year stands out clearly as the mark dividing petty offenses and serious crimes, and that the New York system is precisely in line with the prevailing national position.

B. In New York law misdemeanors are not treated as serious crimes.

In 1967 the New York legislature revised the Penal Law to rationalize the classification and punishment of crimes. Numerous felonies were reduced to misdemeanors, and many offenses formerly misdemeanors were reduced to

"violations," which are not crimes, and are punishable by no more than fifteen days' imprisonment. N.Y. Penal Law §§10.00(3), 10.00(6), 70.15. The resulting classification shows deliberate action by the legislature to separate serious crimes into the category of felonies—crimes punishable by "imprisonment in excess of one year" [N.Y. Penal Law §10.00(5)]—and to leave the less serious crimes to be treated differently.

For felonies the prison sentences allowable are generally indeterminate sentences, with a maximum term of at least three years, and the defendant is committed to the custody of the State Department of Correction for incarceration in a State Prison. N.Y. Penal Law §§70.00, 70.20(1), 70.05(2). For a misdemeanor the maximum sentence is to a definite term of up to one year in a county or regional jail. N.Y. Penal Law, §§10.00(4), 70.15, 70.20(2). There is no provision for imprisonment at hard labor. While misdemeanors are normally prosecuted by information or complaint, no person may be prosecuted for a felony without indictment by a grand jury, and accused felons are entitled to be tried by a regularly constituted twelve-man petit jury. N.Y. Const. Art. I, §§2, 6, and Art. VI, §18; N.Y. Code Crim. Proc. §§22, 355; N.Y.C. Crim. Ct. Act §31. Police powers of arrest are broader for felonies than lesser offenses. N.Y. Code Crim. Proc. §177.

The sharp differences in the manner of prosecution and in the direct consequences of conviction of felonies and misdemeanors are followed by differences in the collateral effects.* Conviction of any felony results in the automatic

* Appendix B *infra* sets forth citations to provisions which govern the collateral consequences of conviction in New York State.

denial or revocation of certain important rights and privileges in New York State, such as forfeiture of public office and civil rights, and disbarment. Similarly, only a felon loses the right to vote, one of the most fundamental rights of citizenship. N.Y. Election Law §152. On the other hand, in only a very narrow class of cases is a privilege or license automatically denied or revoked following conviction of any misdemeanor. As a general rule, conviction of a misdemeanor merely gives a licensing or supervisory authority the discretionary power to revoke or suspend a license or to remove an individual from an occupation or business affecting the public welfare.

The distinctions presently drawn in New York between felonies and misdemeanors are important not only because they reflect clearly the New York community's judgment that crimes in the state are to be divided into two distinct categories, one serious, the other not. They are important also because they accord with federal law and the positions of other states relating to the classification of crimes.

C. The distinction in New York law between serious and petty crimes coincides with the distinction at federal law between infamous and nonindictable crimes.

The difference between serious and petty crimes in New York coincides with the settled difference between "infamous," indictable federal crimes, and other crimes. Certainly, the Fifth Amendment right not to be "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," is objective evidence of the scope of "serious crimes" under the Sixth Amendment. As was stated in another context in the historic opinion in *Ex parte Milligan*, 71 U. S. 2

(1866), "* * * * the framers of the Constitution, doubtless, meant to limit the right to trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Id.* at 123. The parallel between the right to indictment and the right to jury trial was noted again in *Duncan*, Mr. Justice WHITE quoting Blackstone's 18th Century discussion:

> " 'Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown.' " 391 U. S. at 151.

In *Schick* v. *United States*, 195 U. S. 65 (1904), the Court used the term "serious offense," as applied to the Sixth Amendment, interchangeably with the term "infamous crime" in the Fifth Amendment, thereby reflecting common understanding. 195 U. S. at 68; see also *State* v. *Owens*, 54 N.J. 153, 159-161, 254 A.2d 97, 100-101 (1969); *Duffy* v. *People*, 6 Hill (N.Y.) 75, 78 (1843); *People* v. *Bellinger*, 269 N.Y. 265 (1935); *People* v. *Erickson*, 302 N.Y. 461, 466 (1951); Mass. Decl. of Rights §12. After the *Schick* decision, *supra*, Congress provided:

> "All offenses which may be punished by death, or imprisonment for a term exceeding *one year*, shall be deemed felonies. All other offenses shall be deemed misdemeanors" (emphasis added). Crim. Code §335, c. 321, 35 Stat. 1088, 1152, enacted 1908, eff. 1910, quoted in *Duke* v. *United States*, 301 U. S. 492 (1937).

The effect of this statute was to divide serious, or infamous crimes, which were to be prosecuted by indictment, from petty offenses, which could be prosecuted by information. This distinction between indictable and other offenses,

based upon the one-year sentence, has been approved by the federal courts. *Duke* v. *United States, supra; Falconi* v. *United States*, 280 Fed. 766, 767 (6th Cir. 1922); *United States* v. *Sloan*, 31 F. Supp. 327, 331 (W.D.S.C. 1940); see also N.Y. Const. Art. I, §6; *People* v. *Bellinger*, 269 N.Y. 265, 271 (1935). It has been preserved by the Federal Rules of Criminal Procedure.* While the Fifth Amendment right to indictment has not been applied to the states, laws in some states provide that a person has the right not to be prosecuted for certain crimes except by indictment by a grand jury, and it is significant that in almost all of these states the indictable crimes carry more than a one-year sentence, and the non-indictable crimes are punishable by imprisonment for a maximum of one year (see Appendix A III, *infra*, pp. A5-A6).

Indictable offenses under the Fifth Amendment also include offenses punishable by imprisonment in a penitentiary or at hard labor [Fed. R. Crim. Proc. 7(a); *Ex parte Wilson*, 114 U. S. 417, 426 (1885); *United States* v. *Moreland*, 258 U. S. 433 (1922)], or by disqualification from holding public office. *Ex parte Wilson, supra* at 426. Again, these consequences apply to felonies in New York, but not to misdemeanors.

In short, New York's classification of crimes is precisely in line with the Fifth Amendment distinction between in-

* "An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or information. An information may be filed without leave of court." Fed. R. Crim. Proc. 7(a); see also Notes of Advisory Committee on Rules.

dictable and non-indictable offenses. The requirement of a grand jury indictment expresses the same policies as the right to a jury trial: protection, through the intervention of the citizenry, against arbitrary action by the Government. Since an offense punishable by up to one year in jail, without hard labor, may be tried without the constitutional protection afforded by a grand jury, it may be tried without a petit jury.

D. The distinction in New York between serious and petty crimes coincides with the prevailing distinction between such crimes in the United States.

New York's division between serious and petty offenses accords not only with the "infamous crime" classification at federal law, but with the predominant classification of serious and petty offenses throughout the United States. In every state, as in the federal system of criminal justice, serious crimes are classified as "felonies," lesser offenses as "misdemeanors." This universal classification is highly relevant to an assessment of the seriousness of a New York misdemeanor. It reflects commonly accepted notions as to the boundary between two clearly distinguishable classes of crimes, serious crimes and misdemeanors. Indeed, in *Schick* v. *United States, supra,* 195 U.S. 65, 68-72 (1904), the treatment of the historical background of the right to trial by jury confirmed that misdemeanors are petty offenses within the meaning of the Sixth Amendment. As was noted in *Schick,* 165 U.S. at 69-70, quoting 4 BLACKSTONE COMMENTARIES 5:

> "'In common usage the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye; while merely faults and omissions of

> less consequence are comprised under the general name of "misdemeanors" only.' "

As appellant points out, in some jurisdictions, such as Louisiana, serious offenses, punishable by more than one year, may be called "misdemeanors." But in the majority of states, and the federal system, misdemeanors are punishable by not more than one year's imprisonment, felonies by a greater amount (see Appendix AI, *infra*, pp. A1-A3). A six-month boundary between misdemeanors and felonies is far from the general pattern.

Another objective indication of the seriousness of crime is the type of prison where the sentence is to be served. *Ex parte Wilson*, 114 U.S. 417 (1885); *United States* v. *Moreland*, 258 U. S. 433 (1922). Again, the one-year cutoff prevails. In twenty-two states, the largest group, misdemeanor sentences of up to one year are served in the county jail, felony sentences in a state prison or penitentiary, as in New York (see Appendix AII, *infra*, pp. A3-A5).

Similarly, many states, like New York, impose serious collateral disabilities upon convicted felons which are not visited upon misdemeanants. For example, twenty-six of the states with a one-year cutoff between misdemeanors and felonies (listed in Appendix AI, *infra*) provide for depriving convicted felons of the right to vote. See *Green* v. *Board of Elections*, 380 F.2d 445, 450-451 (2d Cir. 1967), *cert. denied* 389 U. S. 1048 (1968). The exclusion of "felons" from voting has been cited as a reasonable classification, permitted by the Fourteenth Amendment. *Gray* v. *Sanders*, 372 U. S. 368, 380 (1963); *Green* v. *Board of Elections, supra*. In many states with the one-year cutoff between felonies and misdemeanors, and in the federal sys-

tem, convicted felons are deprived of the right to hold public office (see Appendix A IV, *infra*, pp. A6-A7). Conviction of a felony is a ground for divorce in most states. BOARDMAN'S N.Y. FAMILY LAW, Chart of Divorce Laws (1967).

Congress, in addition to its historic choice of the one-year sentence as the boundary for indictable offenses, has frequently indicated that the one-year sentence reflects the contemporary American view of seriousness. The national legislature has preserved the standard distinction between felonies and misdemeanors, the latter punishable by no more than one year's imprisonment. 18 U.S.C. §1. Powers of federal officers to arrest are broader for felonies than misdemeanors, as in New York. 18 U.S.C. §§3052, 3056.

In the Federal Magistrates Act of 1968, Congress adopted the term "minor offenses," defining these as "misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1000, or both." 18 U.S.C. §3401(f). Jurisdiction over most "minor offenses" was vested in the United States Magistrate, subject to the defendant's approval, the Magistrate replacing the United States Commissioner, whose jurisdiction had been limited to "petty offenses" punishable by no more than six months' imprisonment. 18 U.S.C. §3401, *repealed* 1968. It was the view of Congress that "such minor criminal matters," punishable by more than six months but not more than one year, could easily be handled by a lesser judicial officer than a United States District Judge, whose court should not be burdened with them. Senate Report (Judiciary Committee) No. 371, 90th Congress, 1st Session, June 28, 1967, p. 30.

Further, the Omnibus Crime Control and Safe Streets Act of 1968 authorized eavesdropping by state court order in the investigation of crimes not enumerated in the statute only if the penalty is more than one year's imprisonment. 18 U.S.C. §2516(2). And in liberalizing recently the provisions for selection of grand and petit jurors, Congress chose to disqualify persons who have been convicted of a crime punishable by more than one year's imprisonment. Jury Selection and Service Act of 1968, 28 U.S.C. §1865(b)(5). These congressional enactments, many effective since the *Duncan* decision, reflect the Congressional view that a one-year sentence is the appropriate point at which to divide serious and petty offenses.

Appellant relies upon 18 U.S.C. §1, wherein Congress in 1930 distinguished "petty offenses" from other crimes. That provision has been referred to by this Court in ruling, in the exercise of its supervisory power over the lower federal courts, that penalties not exceeding six months could be imposed in criminal contempt cases without affording the right to a jury trial. *Cheff* v. *Schnackenberg,* 384 U. S. 373, 379-380 (1966). But that provision carries no weight in a constitutional analysis under the Sixth Amendment. Far from reflecting a serious view of a constitutional demarcation, it appears to have been a compromise cutoff, designed to remove minor prohibition cases from the cumbersome procedure of prosecution by indictment and trial by jury. House Report No. 1699, 46 Stat. 1029, Dec. 16, 1930; Congressional Record, Vol. 72, Part IX, pp. 9991-9994, June 3, 1930. Today, the legislative classification of "petty offenses" in Section 1 stands in isolation in the United States Code, its significance removed by the Federal Magistrates Act. Indeed, there is

no cutoff for jury trials for federal crimes, provisions of Congress and this Court for jury trial in United States District Courts remaining noncommittal.* By contrast, Rule 43 of the Federal Rules of Criminal Procedure provides that the defendant must be present at a trial of an offense punishable by imprisonment for more than *one year*, but may waive presence at a trial of an offense punishable by not more than *one year*.

E. Provisions for jury trial in other states support the New York cutoff of one year.

Ignoring the substantial indications throughout the nation that misdemeanors punishable by no more than one year's imprisonment are not in the class of serious crimes, appellant turns to provisions relating to the manner of trial, and asserts that "New York City is the only place in the United States where appellant could have been sentenced to a year's imprisonment without a jury trial" (appellant's brief, p. 12). However, the question in this case is a constitutional question under the Sixth Amendment, and this Court made it clear in *Duncan* that New

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* "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval and consent of the Government." Fed. R. Crim. Proc. 23.

The Federal Magistrates Act of 1968 provides:

> "Any person charged with a minor offense may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial before a judge of the district court and that he *may* have a right to trial by jury before such judge and shall not proceed to try the case unless the defendant, after such explanation, signs a written consent to be tried before the magistrate that specifically waives both a trial before a judge of the district court and any right to trial by jury that he *may* have" (emphasis added). 18 U.S.C. §3401(b). See also Fed. R. Proc. for U. S. Magistrates 5(c).

York is not alone in withholding a Sixth Amendment jury trial for offenses carrying a penalty of up to one year in jail. The Court pointed out that many states provide no jury trial of the type recognized by the United States Constitution, for crimes punishable by up to one year's imprisonment. 391 U. S. at 158, n.30.

Nine states, including New York, authorize juries of fewer than twelve persons for crimes punishable by a maximum sentence of imprisonment of one year in jail.* This Court has ruled that the constitutional right to a jury trial, where applicable, requires a twelve-man jury; the New York Court of Appeals has frequently so held, approving the six-man juries that are used outside New York City only on the ground that the right to trial by jury does not apply to misdemeanors.**

Similarly, in five states a jury trial is available only on appeal for persons who have been previously found guilty, after a trial without a jury, of offenses carrying a maximum penalty of one year's imprisonment. This practice has been held to be unconstitutional as to cases governed by the federal constitution. *Callan* v. *Wilson,* 127 U. S. 540, 557 (1888). In one state nonunanimous verdicts are permitted in cases where a maximum term of imprisonment

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* See Appendix C, *infra,* for a survey of state provisions for jury trial. This Appendix differs in organization and content from appellant's Appendix A.

** *Patton* v. *United States,* 281 U.S. 276, 288, 290 (1930); *Maxwell* v. *Dow,* 176 U.S. 581, 586 (1900); *Thompson* v. *Utah,* 170 U.S. 343, 349, 350, 353 (1898); *Rasmussen* v. *United States,* 197 U.S. 516 (1905); *People ex rel. Frank* v. *McCann,* 253 N.Y. 221, 225-226 (1930); *People ex rel. Eckler* v. *Clark,* 23 Hun 374, 376 (1881); *People ex rel. Murray* v. *Justices,* 74 N.Y. 406 (1878); *People ex rel. Comaford* v. *Dutcher,* 83 N.Y. 240 (1880).

of one year is prescribed. Again, under pronouncements of this Court such a "jury trial" would be no trial at all if a constitutional right to trial by jury were applicable.*

Thus, there are thirteen different states** whose provisions for trial of misdemeanors carrying maximum penalties of one year in jail would be void if such a sentence rendered the crime "serious" within the meaning of the Sixth Amendment. It is noteworthy that the constitutions of many of these states contain provisions for trial by jury comparable or identical to the Sixth Amendment, and that five of these states were among the original Colonies, whose systems of justice incorporated the common law concept of jury trial.† This experience reflects a widespread belief that crimes punishable by one year's imprisonment are not serious enough to warrant a full-fledged trial by common law jury, the latter procedure being reserved for serious crimes.

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* *Andres* v. *United States*, 333 U.S. 740, 748 (1948); *Patton* v. *United States*, 281 U.S. 276, 288-290 (1930); *Thompson* v. *Utah*, 170 U.S. 343, 347, 350, 353 (1898); *Maxwell* v. *Dow*, 176 U.S. 581, 586 (1900); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 970 (1926); Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases*, 47 ORE L. REV. 417 (1968).

** Alaska, Arkansas, Georgia, Iowa, Kentucky, Maine, Mississippi, New Hampshire, New York, Oklahoma, Oregon, Rhode Island, Virginia.

† See N.Y. cases cited at n., p. 20, *supra*; *State* v. *Jackson*, 69 N.H. 511, 43 Atl. 749 (1898); see also *Jackson* v. *Commonwealth*, 221 Ky. 823, 299 S.W. 988 (1927); *Knudson* v. *City of Anchorage*, 358 P.2d 375 (Alaska 1960); MCDANEL, THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901-1902, pp. 111-112 (1928) (jury of fewer than twelve adopted because of the feeling that minor criminal cases did not require the expense of a twelve-member jury); *State* v. *Maier*, 13 N.J. 235, 99 A. 2d 21 (1953) ("disorderly persons" offenses, such as simple assault, punishable by up to one year's imprisonment, are triable without a jury).

The Supreme Court's reference in *Duncan* to these state provisions carries a clear suggestion that a potential one-year sentence does not give rise to a Sixth Amendment right to a jury trial. For, notwithstanding these extensive procedures for trials without Sixth Amendment juries in cases wherein a one-year sentence is permitted, the Court indicated that *Duncan* would have no far-reaching effect on the states:

> "It seems very unlikely to us that our decision today will require widespread changes in state criminal process. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. In addition, most of the states have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four states in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year." 391 U. S. at 158, n.30.*

In twenty-eight states a common law jury trial is available for crimes punishable by a maximum term of imprisonment which is less than one year. For example, in Hawaii all offenses punishable by more than thirty days'

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* Appellee's research indicates that cases with a maximum penalty of imprisonment greater than one year may be tried without a common law jury in the first instance in ten states: Florida, Louisiana, Maryland, Massachusetts, Oregon, North Carolina, Pennsylvania (Philadelphia), South Carolina, Texas and Utah. While Oregon has a one-year cutoff for cases which may be tried by a jury of fewer than twelve persons (see pp. 20-1, *supra*), in cases tried by a twelve-man jury a ten-twelfths verdict is authorized, except cases of murder in the first degree, when a unanimous verdict is required.

imprisonment must be tried with a common law jury, if the defendant chooses. *Territory* v. *Kiyoto Taketa*, 27 Haw. 844, 847-849 (1924); Haw. Rev. Laws §216-7 (1955). In California the defendant is entitled to a twelve-man jury at a trial of any offense punishable by imprisonment. Cal. Const. Art. I, §7; Cal. Penal Code Ann. §§689, 1042 (1956), §190 (amend. 1968). Of course, the laws in these twenty-eight states give little support for appellant's argument that a cutoff of six months is constitutionally required, for only six of these states have the six-month cutoff for cases triable without a common law jury; this hardly compels a constitutional ruling in favor of the six-month boundary. By contrast, in eighteen of these states there is, in effect, no cutoff, since a common law jury trial is available if any imprisonment may be imposed; in addition, two states have a thirty-day cutoff, and in two states no more than three months' imprisonment may be imposed without a common law jury trial. Clearly, such provisions provide no guidelines for this Court for distinguishing between petty and serious cases under the Sixth Amendment; to use appellant's terms (brief, pp. 14-15, n.11), the existence of these low cutoffs "proves too much," since they are well within the six-month line of demarcation which has already been approved by this Court.

F. The historical background of the right to a jury trial supports New York's system.

It is well settled that

> "the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument * * *." *Thompson* v. *Utah*, 170 U.S. 343, 350 (1898).

Imprisonment after trial without a jury was common.

> "At the time of the adoption of the Constitution, there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction." *District of Columbia* v. *Clawans*, 300 U. S. 617, 624 (1937).

Included in the offenses subject to trials without juries at common law were violations of laws relating to small thefts, gambling, "cheats," offenses to property, vagabondage, disorderly conduct and smuggling. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 928 (1926). Appellant Baldwin, vainly striving to justify a six-month cutoff for petty offenses, claims that "historically," that cutoff characterized offenses that were triable without a jury (brief, p. 14). However, the study he cites reached no such conclusion, referring instead to contemporaneous England. Frankfurter & Corcoran, *supra* at 933-934. Of course, at common law specified terms of imprisonment for specific crimes were not the most common form of penalty prescribed, punishment generally consisting of capital punishment, dismemberment, whipping and other corporal punishment, a fine, incarceration for an indefinite period pending payment of the fine or posting of surety, and levy upon the offender's property. *Ibid.*; see also *United States* v. *Moreland*, 258 U. S. 433, 441-451 (1922) (BRANDEIS, J., dissenting); *Ex parte Wilson*, 114 U. S. 417 (1885); 4 BLACKSTONE COMMENTARIES 283 (Cooley Ed. 1899). Consequently, comparisons with present-day punishment are often difficult.

> "It is impossible to determine what term of imprisonment would be an exact equivalent for the pain and disgrace occasioned by 20 stripes laid upon the bare back or by two or three hours' confinement in stocks located near the meeting house, or in some other public place." *State* v. *Jackson,* 69 N.H. 511, 43 Atl. 749, 754 (1899); *cf. Mackin* v. *United States,* 117 U. S. 348, 351 (1886).

However, provisions for specific terms of imprisonment did exist, and "there were petty offenses, triable summarily under English statute, which carried possible sentences of imprisonment for periods from three to twelve months." *District of Columbia* v. *Clawans,* 300 U. S. 617, 626 (1937). Sentences of imprisonment for one year were prescribed for offenses involving certain assaults, rogues and vagabonds, lottery agents, and destruction of tidal barriers. A sentence of a year and a half could be imposed without a jury trial for negligent arson by a servant, and various ne'er-do-wells "might be committed indefinitely unless heavy surety were forthcoming for their indefinite good behavior." Frankfurter & Corcoran, *supra* at 927, 932. Such practices continued in the Colonies. A Maryland statute provided that vagrants in Baltimore County "might be committed by 2 justices for one year unless good security be given." *Id.* at 1007. In Virginia, whose constitution set the pattern for the Sixth Amendment, a person convicted of gaming, a crime triable by a single justice, was subject to a fine of 5 pounds and commitment to jail until he secured sufficient security for his good behavior for 12 months. *Id.* at 1011.

In New Jersey, accused "disorderly persons" were tried without a jury. This practice was continued after the Revolution, and the "disorderly persons" statute was

gradually enlarged to provide a penalty of up to one year's imprisonment for a wide range of offenders, including common thieves and pickpockets. In *State* v. *Maier,* 13 N.J. 235, 99 A.2d 21 (1953), the Supreme Court of New Jersey, in a scholarly opinion by Chief Justice VANDERBILT which reviewed at length the history of summary trials, rejected a claim that the New Jersey statute violated the right to trial by jury contained in the state constitution, a provision identical to the federal Sixth Amendment. The statute was also upheld in New Jersey after the *Duncan* decision. *State* v. *Owens,* 102 N.J. Super. 187, 245 A.2d 736 (1968), *aff'd on other grounds,* 54 N.J. 153, 254 A.2d 97 (1969).

When New York became independent, its first Constitution incorporated into the state's earliest jurisprudence the Colony's ability to try numerous offenses without a jury. Indeed, before the Revolution in some counties it was the practice to try before three justices any person committing "any misdemeanor, breach of the peace or other criminal offense under the degree of grand larceny," if the accused could not provide bail within 48 hours. Frankfurter & Corcoran, *supra* at 945-46. (Petty thieves were also prosecuted in other Colonies without a jury. *Id.* at 943, 955, 992.) As early as 1824, it was recognized in New York that trials of "petit larceny and other small offenses" in courts of Special Sessions would have been an infringement on the right to jury trial guaranteed by the New York Constitution, except that "the first act instituting such Courts * * * was passed by the colonial legislature in 1744 * * * [and] no right of trial by jury ever existed in those Courts." *Jackson* v. *Wood,* 2 Cow. (N.Y.) 819 (1824); *Murphy* v. *People,* 2 Cow. (N.Y.) 815 (1824). Since 1824

a jury of six was provided in Special Sessions in some counties, but that procedure has been upheld on the theory that since no jury at all is required, a number of jurors fewer than that constitutionally required is permissible. See *People ex rel. Comaford* v. *Dutcher,* 83 N.Y. 240 (1880). The appellate courts thus sustained, after the Revolution, trials for "petit larceny, and offences not infamous in their character, under the degree of grand larceny without indictment and without a jury." *Duffy* v. *People,* 6 Hill (N.Y.) 75, 78 (1843). Ultimately, the distinction drawn between serious and petty offenses was the difference between "felonies" and "misdemeanors," with a one-year sentence as the boundary. *People* v. *Bellinger,* 269 N.Y. 265 (1935); *People ex rel. Cosgriff* v. *Craig,* 195 N.Y. 190 (1909); *People ex rel. Comaford* v. *Dutcher,* 83 N.Y. 240, 243 (1880).

But the Court of Appeals has not, as appellant claims, exalted labels above substance. Despite various legislative definitions, the Court of Appeals has held that "it is not the mere name of the crime but the punishment therefor that characterizes it" as a felony or misdemeanor for these purposes. *People ex rel. Cosgriff* v. *Craig, supra* at 197; see *People* v. *Bellinger, supra* at 269. Where the legislature denominated a criminal act a misdemeanor, but prescribed a punishment of more than one year, indictment and a common law jury were required, since the crime was not really a petty offense. *Ibid.* The New York courts thus came to a holding similar to *Duncan's* 60 years earlier.

Since this jurisprudence in New York and New Jersey is based on constitutional provisions with the same roots as the Sixth Amendment, it is persuasive evidence of the meaning of trial by jury in the latter provision.

G. The severity of the punishment authorized for the offense charged is the only reliable test of its seriousness.

Appellant argues that his offense of jostling, while prosecuted as a misdemeanor, was really a completed grand larceny, a felony under present New York law punishable by up to four years in prison [N.Y. Penal Law §§70.00(2)(e), 155.30], and therefore was of such a serious nature as to require trial by jury. This attempt to go beyond the charge and conviction to the "essence" of the offense has no merit. In *Bloom* v. *Illinois,* 391 U.S. 194 (1968), the petitioner claimed that his offense of contempt, committed by filing a spurious and forged will for probate, was really a forgery, punishable in Illinois by 14 years' imprisonment; this Court, however, treated the offense as a contempt, as it had been treated by the State of Illinois. *Id.* at 210-211. In *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216 (1968), the petitioners' contempt amounted to an assault with a deadly weapon or an attempted murder, but this Court treated the offense as a contempt. No workable alternative exists. For the charge and conviction are the best evidence of the seriousness with which the acts are treated, and were this Court to look beyond the record for the shadowy "essence" of the offense, it would have to proceed without findings of fact or a definite record of the facts relating to the greater offense. Nor should a defendant be heard to complain that his rights were violated because, in accordance with common practice in large cities with heavy calendars of felony cases, his acts were prosecuted as a misdemeanor rather than as a technical felony.

Also attempting to find the "nature" of his offense in the past, appellant argues that jostling was similar to

picking pockets, a serious offense at common law. Again, there is no need to go beyond the present record to determine the seriousness of the offense. Appellant's strained effort to find an old English equivalent of "jostling," a 20th Century offense unknown at common law or in the Colonies (brief, pp. 24-5), illustrates the difficulties of such an approach. Such analysis generally proceeds without substantial guidance from the common law, and has led to anomalous rulings; for instance, it has been held that certain offenses punishable by only thirty days' imprisonment are serious, *Callan* v. *Wilson*, 127 U. S. 540 (1888), *District of Columbia* v. *Colts*, 202 U. S. 634 (1930), while others punishable by imprisonment for six months or ninety days are not. *Dyke* v. *Taylor Implement Mfg. Co., supra* at 220 (1968); *Frank* v. *United States*, 395 U. S. 147, 150 (1969); *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937). That approach would also multiply litigation and prolong uncertainty, for it would entail a separate determination—perhaps ultimately by this Court—as to countless substantive provisions of a penal code, based upon the supposed common law or Colonial analogy to the specific offense in question; indeed, appellant virtually invites such a piecemeal review as to each of the Class A misdemeanors in the New York Penal Law (brief, pp. 21-3).

Plainly, "the severity of the authorized punishment is the only reliable test" of the seriousness of a crime. *State* v. *Owens*, 54 N.J. 153, 160, 254 A.2d 97, 101 (1969). This is "supported by decisions * * * under constitutional provisions requiring indictment for 'infamous crimes.' Whether a crime is 'infamous' is held to depend upon the punishment that is authorized, without any suggestion that an act

which at common law was deemed an infamous wrong must forever be denounced with like severity. *Ex parte Wilson*, 114 U. S. 417 * * *." *State* v. *Owens, supra*, 54 N.J. at 161, 254 A.2d at 100-101. As the Supreme Court of New Jersey recently stated in the *Owens* case, per WEINTRAUB, C.J.:

> "Our Constitution was not intended to consecrate the common law's treatment of any specific misconduct and thus to bar legislative revaluation of it in the light of changing conditions and mores. Rather the Constitution abstracted from the common law the concept that whether a prosecution must be by indictment and jury trial depends upon the consequences which ensue from a conviction * * * Nor do we think it useful to sample popular opinion to determine how much stigma is attributed to each act of misconduct and thereupon to decide, in some way which escapes us, whether an offense is more than petty notwithstanding the statute has so treated it. It is for the Legislature alone to assay the public's judgment, and the Legislature does so when it prescribes the legal consequences which may attend a conviction * * *." *State* v. *Owens, supra*, 54 N.J. at 159-160, 254 A.2d at 100-101.

Perhaps recognizing the difficulty of ascertaining "the nature of the offense" in every case, this Court appears now to have turned to punishment as the "most relevant indication of the seriousness of an offense." *Frank* v. *United States, supra* at 148; see also *Duncan* v. *Louisiana, supra* at 159.

Appellant points out that "a year's imprisonment is no small matter in any person's life" (brief, p. 16), but the same may be said of six months' imprisonment, or three months'. For most persons, a criminal conviction without any imprisonment is no small matter. A sentence of one

year may be less "serious" to a footloose offender with a long history of prior convictions, such as appellant (App. 20), than to the head of a household with a clean record. But if the issue is resolved, "'not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments'" [*Frank* v. *United States, supra* at 152; *District of Columbia* v. *Clawans, supra* at 628], the one-year maximum sentence is the most readily justifiable boundary between serious and petty offenses. A predictable standard, it is supported by past and present interpretations of the Fifth and Sixth Amendments, and it is reflected in the jurisprudence and penal provisions of most states and the federal system.

POINT II

The limitation of six-man juries to misdemeanor trials conducted outside of New York City is not arbitrary, and therefore did not deprive appellant of the equal protection of the laws.

Under a New York legislative scheme originating in 1824, in the lower criminal courts outside of New York City accused misdemeanants are entitled, on demand, to be tried by a jury of six persons. N.Y. Code Crim. Proc. §§701, 710. Appellant alleges that he was denied equal protection of the laws because no six-man jury is available in the New York City Criminal Court.

Before turning to the refutation of this claim, the argument may be placed in proper context. It must be assumed

in this discussion that a jury trial is not required by the Sixth Amendment for misdemeanor cases in New York City; otherwise, there would be no need to treat the issue of equal protection. Moreover, a six-man jury would not satisfy the requirement of a jury trial under the federal constitution, or even under New York's constitution (see Point I, *supra*); indeed, the New York Constitution authorizes the legislature to draw the distinction it has drawn (App. 30, n. 2). Therefore, it does not advance the discussion of the equal protection issue to assert, as appellant does, that the right to a trial before a six-man panel is a "fundamental right" under the federal and state constitutions (brief, pp. 9, 43-4).

From this faulty premise appellant claims that where such "fundamental right" is involved, any classification which reduces the exercise of that right is unconstitutional, " 'unless shown to be necessary to promote a *compelling* governmental interest' " (brief, pp. 43-4), quoting *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). However, the burden of showing a compelling state interest to justify a classification is imposed only when a federal constitutional right is impaired, such as the right to vote or, as in *Shapiro* v. *Thompson*, the "constitutional right" to move "from State to State."

Thus, appellant's equal protection argument reduces to this: even assuming that New York State does not have to provide a six-man jury in a misdemeanor case anywhere within its boundaries, if it provides such a jury somewhere in the state it must do so everywhere. This argument is without merit.

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961).

In the case at Bar, the legislative classification is territorial, and readily justifiable, for "territorial uniformity is not a constitutional prerequisite." *Id.* at 427.

In *Salsburg* v. *Maryland,* 346 U.S. 545 (1954), this Court held that the equal protection clause was not violated by a Maryland statute that made evidence obtained by illegal search or seizure generally inadmissible in prosecutions for misdemeanors, but permitted such evidence in prosecutions for certain gambling misdemeanors in one specified county. The Court quoted from an opinion in an earlier case which disposes of the present claim of denial of equal protection:

"There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so * * *

> "Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies." *Missouri* v. *Lewis,* 101 U.S. 22, 31-32 (1879), quoted at 346 U.S. at 551, 551 n.6; see also *Ohio* v. *Akron Park District,* 281 U.S. 74, 81 (1930); *Ocampo* v. *United States,* 234 U.S. 91, 98-99 (1914).

In *Missouri* v. *Lewis, supra,* the Court sustained a system in which all appeals from certain counties in Missouri lay directly to the Supreme Court of the state, but appeals in other counties lay to the St. Louis Court of Appeals, with further appeal to the Supreme Court only in cases having a certain minimum amount in controversy. In *Chappell Chemical Co.* v. *Sulphur Mines Co.,* 172 U.S. 474 (1899), the Court upheld a provision in the Maryland Constitution which withdrew the right of trial by jury in the courts of Baltimore without a similar provision for the rest of the state. In *Ocampo* v. *United States, supra,* the Court sustained a system whereby preliminary hearings were not held in Manila in criminal cases prosecuted by information, but were held in such cases in the rest of the Philippines. *Gardner* v. *Michigan,* 199 U.S. 325, 333-334 (1905), rejected a defendant's claim that persons in Wayne County, which includes Detroit, were deprived of equal protection by a statute providing a method for selecting juries in that county different from the method applicable in the rest of Michigan. The *Gardner* and *Lewis* cases were cited in *Morris* v. *Alabama,* 302 U.S. 642 (1937), for the conclu-

sion that no substantial federal question was raised by a defendant, convicted of murder, who claimed that he was denied equal protection by a system of selecting juries applicable in only the most populous county in the state. See also *Hayes* v. *Missouri*, 120 U.S. 69 (1887); *Mallett* v. *North Carolina*, 181 U.S. 589, 597-599 (1901).

The New York system at issue here is one of several throughout the United States in which territorial divisions have been made in provisions for jury trials. The Michigan Supreme Court has upheld the procedure whereby appeals of convictions for minor offenses in Detroit are heard on the record by certiorari, whereas in the rest of Wayne County there is a trial *de novo*. *Walber* v. *Piggins*, 2 Mich. App. 145, 138 N.W.2d 772 (1966). In Kentucky, cities are divided into classes by population and the availability of jury trials for petty offenses differs in each class, the scope of jury trial diminishing as the size of the city increases. Ky. Rev. Stat. chs. 25, 26. In Georgia, a jury in misdemeanor cases ranges in size from five to twelve persons depending on the county; the Criminal Court of Atlanta, for example, tries misdemeanors with juries of five, while in Hall County the same crimes are tried by juries of twelve. Ga. Laws 1890-1891, pp. 935, 939.

Many states, including New York, have differences in appellate procedures which would be void if appellant's theory as to territorial uniformity were correct.* The

* Appeals from the New York City Criminal Court, and from the lower criminal courts in Westchester, Nassau and Suffolk Counties, are heard by a panel of three judges of the Appellate Term of the Supreme Court. N.Y. Code Crim. Proc. §517(2); 22 NYCRR §§640.1, 730.1 (c), (e). In the other counties, appeals from the in-

Supreme Court of California recently rejected arguments similar to appellant Baldwin's, finding no denial of equal protection in that state's laws providing that in counties with municipal courts appeals in misdemeanor cases are heard by a panel of three judges, whereas in other counties, generally the less populous ones, appeals in misdemeanor cases are heard by a single judge. *Whittaker* v. *Superior Court,* 68 Cal.2d 357, 438 P.2d 358 (1968).

The requirement of state-wide uniformity in criminal procedures that appellant proposes would inhibit progress in the administration of justice. A state should not be forbidden from liberalizing procedures by making them available to defendants in certain parts of the state, either as an experiment or because of conditions prevailing in those regions. May a defendant who is arrested at night in an up-State New York county allege denial of equal protection because the experimental night arraignment program recently inaugurated in New York City has not been attempted in his bailiwick? *Cf. N.Y.C. Crim. Justice Coordinating Council, 18-Month Report,* N.Y.L. Jour. Feb. 5, 1969, p. 4, col. 4. Recently, to ease the burdens of the police and courts, a rule was adapted for the New York City Criminal Court permitting the issuance of a summons

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ferior criminal courts lie to the County Court and are heard by one judge. N.Y. Code Crim. Proc. §517(3).

In New Jersey there is a system for appellate review for misdemeanor convictions which is optional for large counties, N.J. Stat. Ann. §§2A:7-1, 2A:7-20, and differs from the system applicable to the remaining counties. N.J. Stat. Ann. §2A:3-6.

In Minnesota, direct access to the highest court of the state is available only in appeals from the largest county. Minn. Stat. Ann. §§484.63, 488A.01(11).

See also La. Rev. Stat. Ann. §§13:2561.11, 13:2562.11; S.C. Code §§15-601, 15-612, 15-629 *et seq.*; S.D. Code §§32.0905, 32.0906, 32.0911; Va. Code §16.1-106.

in lieu of arrest for persons charged with any offense below the grade of felony committed within the City of New York. 22 NYCRR §2950.10(a). Surely, a person arrested for a misdemeanor in Buffalo has no claim of denial of equal protection because this procedure has not been adopted in his city.

While the burden of establishing the reasonableness of the legislation at issue here is not on the State, *Salsburg* v. *Maryland*, 346 U.S. 545, 553 (1954), we suggest here reasons supporting the classification.

The administrative advantages which in the Colonial period flowed from conducting trials of misdemeanors without juries continue. See *Murphy* v. *People*, 2 Cow. (N.Y.) 815 (1824). As New York City grew and caseloads expanded, severe strains were placed upon the lower criminal court in the City. As recorded in 1954, the Chief Justice of the Court of Special Sessions of New York City, a predecessor of the New York City Criminal Court, pointed to the previous year's calendar of 32,000 cases and the 150% increase in its business between 1945 and 1950, and vigorously complained that its facilities were being overtaxed. N.Y. Times, Jan. 3, 1954, p. 34, col. 1. The court's plight proceeded from bad to worse, and the situation has not been alleviated by the court reorganization of 1962, which combined the Court of Special Sessions and the Magistrates' Courts of New York City in one Criminal Court. Enormous increases in crime and arrests in the 1960's, as well as a proliferation of newly required pre-trial hearings on the validity of searches and seizures, confessions, and eyewitness identifications, are reflected in the long calendars of the Criminal Court, which have fostered the court's reputation as a dispenser of "turnstile justice," a court incapable of coping adequately with the huge volume of cases.

N. Y. Post, Oct. 13, 1969, p. 37. While appellant claims that jury trials would not require many additional judges to cope with the present caseload—a prediction which expressly assumes that three-judge benches would be abolished (brief, pp. 34-5, n.37)—undeniably, jury trials would consume considerable extra personnel, money, and courtrooms. Indeed, with judges' robing rooms presently being used for trials, new court buildings could be required. See *People* v. *Moses,* 57 M.2d 960 (Crim. Ct. N.Y. Co. 1968).

Upon all the evidence, it is also clear that justice would be further delayed. In 1959, the Minnesota Supreme Court held that persons charged in a local court with driving while intoxicated were entitled to a jury trial, because of a state statute requiring uniformity in procedures in such cases. *State* v. *Hoben,* 256 Minn. 436, 98 N.W.2d 813 (1959). "Prior to *Hoben,* the delay in the Minneapolis Municipal Court was approximately three months while after the *Hoben* case the delay was nearly two years." Note, *Right to Jury Trial of Persons Accused of an Ordinance Violation,* 47 MINN. L. REV. 93 (1962).

The problems of court congestion and the enormous expense in administrating justice in the lower courts are inherently harder to resolve in New York City than anywhere else in the state. New York City's population density, a factor directly associated with crime [PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, pp. 5, 28 (1967)], is more than twice Buffalo's, the second largest city in the state. U.S. CENSUS, STATISTICAL ABSTRACT 1968, p. 21, table 20; RAND-MCNALLY POPULATION ESTIMATES, COMMERCIAL ATLAS AND MARKETING GUIDE 31 (100th ed. 1969). New York City is the national center for narcot-

ics and traffic in drugs—almost half of the nation's addicts are there, more than fifty times as many as live in Buffalo* —and it suffers from the other crimes that addiction produces. As the transportation center in the state, it faces special problems of law enforcement, as is evidenced by the case at Bar.

Consequently, as the Court of Appeals noted in its opinion in this case, in New York City the lower criminal court is burdened with misdemeanor calendars heavier than those found elsewhere in the state. In Buffalo, the City Court disposed of 8,189 non-traffic misdemeanor cases in a recent thirty-month period for which figures are available; in the comparable period the New York City Criminal Court disposed of 321,368 non-traffic misdemeanor cases (App. 32).** Thus, while New York City's population is now 17 times as large as Buffalo's,† its misdemeanor caseload is over 39 times as great. The disparity with New York City's caseload is even greater in the rest of the state (see Appendix E, *infra*). Surely, the New York legislature could reasonably conclude that the problems of administering justice in the lower courts are most urgent in New York City. Nor was the legislature required to abolish six-man juries in the rest of the state to preserve appellant's right to equal protection.

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* U.S. Treas. Dept., Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs for Period Ended Dec. 31, 1967, pp. 47, 52.

** July, 1966 through December, 1968. Records are compiled by fiscal year, not calendar year. Since statistics as to traffic cases in Buffalo, unlike New York City, do not distinguish between misdemeanors and violations, all traffic cases have been excluded to enable comparison with the New York City Criminal Court. Source: Office of the State Administrator of the Judicial Conference of the State of New York.

† RAND-MCNALLY POPULATION ESTIMATES, COMMERCIAL ATLAS AND MARKETING GUIDE 31 (100th ed. 1969).

While appellant cavalierly dismisses administrative burdens, delays and expense as proper grounds for a judicial determination as to the scope of criminal procedures, such matters have been cited by this Court as justifying the withholding of jury trials for petty offenses [*Duncan* v. *Louisiana, supra* at 160], and for denying the retroactivity of the Sixth Amendment right to a jury trial for serious offenses. See *De Stefano* v. *Woods,* 392 U.S. 631 (1968).

The reasonableness of withholding six-man "juries" in New York City is confirmed by this Court's recognition that a fundamentally fair trial does not require even a common law jury. The denial of retroactive effect to *Duncan* reflects, in part, the view that the absence of a jury does not significantly affect the reliability of the fact-finding process. Indeed, it is common experience that juries are subjected to histrionics and emotional arguments which would not influence judges. This Court's preference for judges over juries in passing on questions of fact raised by constitutional claims was expressed in *Jackson* v. *Denno,* 378 U.S. 368 (1964); see also *Bruton* v. *United States,* 391 U.S. 123 (1968). Nor has it been established that judges are more likely to convict than juries.* A recent study of jury trials concluded that the jury is "not so much * * * an institution with a built-in protection for the defendant, but rather * * *

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* The president of the Legal Aid Society in New York City recently reported that 49% of the Society's clients who were tried in the New York City Criminal Court in 1967 (without a jury) were acquitted; there were 3,023 convictions after trial, 2,678 acquittals after trial. Speech at annual Judicial Conference of the Second Judicial Circuit of the United States, Lake Placid, N.Y., Sept. 14, 1968, reprinted in N.Y.L. Jour., Sept. 25, 1968, p. 1. The records as to completed trials of all persons on misdemeanor charges show that almost half of the defendants are acquitted (see Appendix D II, *infra*).

an institution which is stubbornly non-rule minded." KALVEN & ZEISEL, THE AMERICAN JURY, 375, 495 (1966).

In sum, there being no overriding urgency for jury trials of petty offenses, a legislature may rationally conclude that "the possible consequences to defendants from convictions for petty offenses" are "insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting in the availability of speedy and inexpensive non-jury adjudications" [*Duncan* v. *Louisiana, supra* at 160], and that juries may be dispensed with in trials of petty offenses in cities with unique problems of court congestion, expense and delay.

The rational basis for the New York Legislature's territorial classification is not vitiated by the provision for a three-judge bench in the New York City Criminal Court (see appellant's brief, pp. 34-5). No doubt a more comprehensive attack on the problems of the New York City Criminal Court would include removal of the historic three-judge bench, but its survival is justifiable as an amelioration of the problems attributed to the absence of jury trial by critics of the New York system.* As was said in *Norvell* v. *Illinois*, 373 U.S. 420, 424 (1963): "The 'rough accom-

* "Use of a multi-judge court would appear to have some of the benefits of a jury trial. There will be an opportunity and necessity for a group judgment; there is not the risk of coming before a single judge with a fixed point of view with respect to certain kinds of cases; and it may be that a multi-judge court would be less reluctant than a single judge to act in mitigation. Thus, apart from the question of whether the limitation of jury trials in New York City can be justified, trial by a multi-judge court deserves consideration as an alternative where jury trial is not permitted or is waived." AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY (tent. draft 1968) 22-23.

modations' made by Government do not violate the equal protection clause of the Fourteenth Amendment unless the lines drawn are 'hostile or invidious.' "

Attempting to buttress his collapsing equal protection claim, appellant relies on decisions of this Court establishing the principle of "one man, one vote." However, those decisions do not forbid reasonable differences in procedure in different political subdivisions. After those decisions this Court, citing *Salsburg* v. *Maryland, supra,* upheld Congress's limitation of the provisions of the Voting Rights Act of 1965 to a small number of states and political subdivisions where Congress could reasonably conclude the problem of voting discrimination was readily established to be most serious. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 328 (1966); see *New York State Association of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148 (S.D.N.Y. 1967); *Whittaker* v. *Superior Court, supra,* 68 Cal.2d 357, 438 P.2d 358, 368 (1968). In the Reapportionment Cases, all persons in the geographical area (the entire state) that was established for the political function were not treated alike, votes for the state-wide legislature being weighted unequally. In the present case, by contrast, every accused misdemeanant in New York City, the area designated for the jurisdiction of the New York City Criminal Court, is treated alike. There is no suggestion in the reapportionment decisions that a state legislature is required to designate the entire state as the single geographical unit for all purposes, including the running of local government, or the administration of inferior criminal courts. The Mayor and four Trustees of the Village of Cazenovia, New York, population 2,685, perform the same functions within their geographical area

as the 37 councilmen of New York City, representing eight million persons. The New York City resident is disadvantaged in comparison with his counterpart in Cazenovia, whose access to his elected representatives is much more direct and whose vote "counts" more in an election for the local legislature. Similarly, the accused misdemeanant in New York City is disadvantaged in comparison with his counterpart in Cazenovia, in that he has no option for a six-man jury. On the other hand, he can be tried by three judges, and his appeal will be heard by three judges, while the case of his Cazenovia counterpart will be heard by one judge at trial and one judge on appeal (see note, p. 36, *supra*). None of these situations involves a denial of equal protection. The state has a free hand in dividing its territory into areas for the performance of public functions, and so long as all citizens in an area designated are treated equally, no denial of equal protection occurs, even if in a neighboring area the function is performed differently.

Nor does *Baxstrom* v. *Herold*, 383 U.S. 107 (1966) support appellant Baldwin. In *Baxstrom*, the law provided for a jury trial before civil commitment to a mental institution. Baxstrom, however, having concluded a prison term, was summarily certified insane and sent to a mental institution without a jury trial. Denial of equal protection was found, since Baxstrom legally was a free man when his prison sentence expired, and he was thus entitled to the same procedures available to non-prisoners. In *Baxstrom*, everywhere in the state mental health system the question whether a person required hospitalization was determined by a jury; having provided that procedure for all other persons in the state, the legislature could not withhold it

from criminal defendants who had served their terms, no reason having been offered for the distinction. *Baxstrom,* then, would be analogous to the present case only if appellant Baldwin had been convicted in New York City without a trial, or if he had been convicted in a county outside of New York City without the option of trial by a six-man panel. But the distinction at issue here is plainly rational.

POINT III

If this Court holds that a jury trial was constitutionally required in this case, the holding should not be retroactive to other cases already tried.

If, contrary to appellee's arguments, this Court accepts appellant Baldwin's view of the Sixth Amendment or the equal protection clause of the Fourteenth Amendment, the question of retroactivity would eventually arise, and would best be decided in this case to avoid future uncertainty. Soon after *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), this Court held that the *Duncan* decision would apply only to cases in which the trial was begun after the date of *Duncan. De Stefano* v. *Woods,* 392 U.S. 631 (1968). Similarly, a broadening in the instant case of the Sixth Amendment and the Fourteenth Amendment along the lines proposed by appellant should apply only to his case, and to trials begun after this Court's decision is handed down.

The factors which call for the prospectivity of the *Duncan* decision also apply here. Drastic disruption of the administration of justice would flow from applying the new ruling to cases already tried. Thousands of convictions entered since *Duncan* would be needlessly overturned,

the cases re-opened. This chaos would not be required by justified concern that the fact-finding process previously employed in the New York City Criminal Court, a trial before a court without jurors, was unreliable (see Point II, *supra*, pp. 40-1). Finally, it is indisputable that New York State courts, prosecutors and other officials justifiably have relied on a conclusion that a jury trial was not constitutionally required in misdemeanor cases in the New York City Criminal Court. Bench trials had been the practice, undisturbed by this Court, from the inception of New York's statehood, and the *Duncan* decision did not vitiate that reliance.

Indeed, this Court in *Duncan* tendered strong suggestions that a potential one-year sentence did not require a jury trial. The Court deemed significant the fact that

> "in 49 out of the 50 states crimes subject to trial without a jury * * * are punishable by no more than one year in jail." 391 U.S., at 161.

Bloom v. *Illinois*, 391 U.S. 194 (1968) contains a similar suggestion that one year's imprisonment is an acceptable boundary between serious and petty offenses under the Sixth and Fourteenth Amendments. In *Bloom*, the Court, having decided "to treat criminal contempt like other crimes insofar as the right to jury trial is concerned" [*id.*, at 210], invalidated a sentence of two years for criminal contempt which was imposed without a jury trial. Referring to the diverse and confusing provisions in the various states as to the scope of punishment for criminal contempt, the Court concluded, in an opinion by Mr. Justice WHITE:

> "It is clear, however, that punishment for contempt is limited to one year or less in over half the States." *Id.*, at 206-207, n. 8.*

Since neither *Duncan* nor *Bloom* involved a one-year sentence, the Court's repeated references to the one-year cut-off was noteworthy in New York.

The reasonableness of continuing the New York practice after *Duncan* is confirmed by the request of New York State in the *Duncan* case that the present New York system be preserved. The Attorney General of New York, in his *amicus curiae* brief in *Duncan*, referred the Court to the New York City Criminal Court Act, and concluded:

> "The Court should render a decision which does not interfere with trial without a jury in the class of criminal prosecution in which it is permitted in New York."

Moreover, when the Court held that *Duncan* was not retroactive, it emphasized that

> "both *Duncan* and *Bloom* left open the question whether a contempt punished by imprisonment for one year is, by virtue of that sentence, a sufficiently serious matter to require that a request for jury trial be honored." *De Stefano* v. *Woods*, *supra* at 633.

From all appearances, the Court carefully avoided invalidating the New York statutes, though it easily could have disposed of the matter and prevented the instant litigation

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* Appellee's research indicates that in 16 states no limit is placed on the sentence which may be imposed without a jury trial for criminal contempt; in three states, a maximum sentence of one year may be imposed without a jury trial. Kan. Gen. Stat. Ann. §§20-1204, 21-111 (1964); N.D. Cent. Code Ann. §§5-01-22 (1960), 42-02-10 (1968); S.D. Code §§13.0607, 13.1235, 33.3703 (Supp. 1960).

on the issue. Undeniably, continued reliance on the validity of the New York system was reasonable, even after *Duncan*.

It might be argued, however, that if appellant's views on the merits are accepted, the Court's ruling in this case must apply to cases tried since the *Duncan* decision, on the theory that this Court's ruling would stem from *Duncan*. Using *Duncan* for a cutoff date (May 20, 1968) would be totally unwarranted. To begin with, there was no indication in the *Duncan* opinion that a jury trial in the case at bar is entailed by *Duncan*. The instant case, not *Duncan*, would be the case that announced the previously undetermined boundaries of petty offenses, or the equal protection clause as it applies to territorial distinctions within a state. Thus, the date of *Duncan* would be irrelevant to the question of retroactivity.

Although *Duncan* would be a steppingstone in the new direction pointed out by appellant, there is ample precedent for holding that the present case, not any prior case, would be the appropriated landmark for determining which cases should be affected by the new rule. The Court has frequently chosen the date of a new decision, not previous cases on which it was based, as a starting date for its applicability. For example, when the Court ruled in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment privilege against self-incrimination was applicable to the states, it was a foregone conclusion that state judges and prosecutors would soon be barred from commenting at trial upon the defendant's failure to testify. Yet, when the Court did hold that such comment was forbidden, in *Griffin* v. *California*, 380 U.S. 609 (1965), that holding was not applied to cases that were already final, even if such cases were tried after *Malloy* v. *Hogan*. *Tehan* v. *Shott*, 382 U.S.

406 (1966). Similarly, *Miranda* v. *Arizona,* 384 U.S. 436 (1966) was an outgrowth of *Malloy* v. *Hogan* and of rulings applying the Sixth Amendment right to counsel, including *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). But *Miranda* was not applied to cases tried prior to its announcement. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). Prior constitutional rulings were also the foundation of *United States* v. *Wade,* 388 U.S. 218 (1967), which held that the right to counsel attached at a line-up. See *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Escobedo* v. *Illinois, supra.* But here again the decision was held inapplicable to cases arising previously, even though such cases might have arisen after *Gideon* and *Escobedo. Stovall* v. *Denno,* 388 U. S. 293 (1967); see also *Desist* v. *United States,* 394 U. S. 244 (1969).

In so urging, we mean to suggest not at all that there is any merit to appellant's interpretation of the Sixth and Fourteenth Amendments. As has been shown above, the New York procedure is consistent with those provisions.

Conclusion

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

ONE-YEAR SENTENCE CUTOFF BETWEEN PETTY AND SERIOUS OFFENSES IN THE UNITED STATES

I. Misdemeanor/Felony Distinction, Maximum Imprisonment for Misdemeanor Is One Year

The felony-misdemeanor distinction exists in every state. In all of the following twenty-eight states (including New York) and the federal system, the maximum sentence of imprisonment for a misdemeanor is one year, for a felony a longer term.

United States:	18 U.S.C. §1
Alaska:	Alaska Stat. Ann. §§11.05.150, 11.75.030 (1962)
Arkansas:	Ark. Stat. Ann. §§41-102, 41-103, 41-104, 41-106 (1964)
California:	Cal. Pen. Code Ann. §17
Colorado:	Col. Const. Art. XVIII, §4; Col. Stat. Ann. §§39-10-19, 39-12-1 (1963)
Connecticut:	Conn. Gen. Stat. Ann. §§1-1, 54-117, Conn. Gen. Stat. (1902) §1528
Georgia:	Ga. Code Ann. §26-401 (1969)
Hawaii:	Hawaii Rev. L. §247-2 (1955), §701-2
Illinois:	Ill. Rev. Stat. c.38, §§1-7, 22-7, 22-11 (1965)
Iowa:	Iowa Code Ann. §687.7 (1950)
Kansas:	Kan. Stat. Ann. §21-109, &21-112 (1964)

Maine:	Me. Rev. Stat. Ann. tit. 15, §§451, 1703 (1964); *Ex parte Gosselin,* 41 Me. 412, 44 A.2d 882 (1945); *Smith* v. *State,* 145 Me. 313, 75 A.2d 538 (1950).
Minnesota:	Minn. Stat. Ann. §§609.02, 59.165 (1964)
Missouri:	Mo. Ann. Stat. §§556.020, 556.030, 556.040, 556.270, 556.490 (1953)
Nevada:	Nev. Rev. Stat. §193.120 (1967)
New Hampshire:	N.H. Rev. Stat. Ann. §§594:1, 607:9, 607:11 (1955)
New Mexico:	N.M. Stat. Ann. §40A-1-5, 40A-1-6 (1964)
New York:	N.Y. Penal L. §§70.00, 70.15 (1967)
North Dakota:	N.D. Cent. Code Ann. §§12-01-07, 12-06-10, 12-06-14 (1960)
Ohio:	Ohio Rev. Code Ann. §§1.05, 1.06 (1969)
Oklahoma:	Okla. Stat. Ann. tit. 21, §§4, 5, 6, 9, 10 (1961); *State* v. *Young,* 20 Okla. Crim. 383, 203 Pac. 484 (1922).
Oregon:	Ore. Rev. Stat. §161.030, 161.080 (1965).
Rhode Island:	R.I. Gen. Laws §11-1-2 (1956).
South Dakota:	S.D. Comp. L. §§22-1-4, 22-6-1, 22-6-2 (1967)
Tennessee:	Tenn. Code Ann. §§39-103, 39-104, 39-105, 40-408 (1955); *Spurgeon* v. *Worley,* 169 Tenn. 697, 90 S.W.2d 948 (1936)

Virginia:	Va. Code Ann. §§18.1-6, 18.1-9 (1968)
Washington:	Wash. Rev. Code Ann. §§9.01.020, 9.92.010, 9.92.020, 9.92.030 (1967)
West Virginia:	W. Va. Code Ann. §61-11-1 (1966)
Wyoming:	Wyo. Stat. Ann. §§6-2, 6-6, 6-7 (1957)

PROPOSED CODES:

Delaware:	Proposed Del. Crim. Code, Gov. Com. for Rev. Crim. Law (1967) (same as N.Y.)
Michigan:	Proposed Mich. Crim. Code (Class A misdemeanor, one-year maximum)
Model Penal Code:	§§1.04(a), 6.08 (1962 ed.) (misdemeanor, one-year maximum)

II. Misdemeanor/Felony Distinction, Maximum Imprisonment for Misdemeanor Is One Year to Be Served in State Prison or State Penitentiary

In the following twenty-two states (including New York), misdemeanors are punishable by a maximum term of imprisonment of one year (Appendix AI, *supra*), and all misdemeanor sentences are served in a county jail or other local jail, all felony sentences in a State Prison or State Penitentiary. See also 28 U.S.C. §4083.

Arkansas:	Ark. Stat. Ann. §41-03 (1964); *Allgood* v. *State*, 206 Ark. 699, 177 S.W.2d 928 (1944)
Colorado:	Col. Const. art. XVIII, §4

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Illinois:	Ill. Rev. Stat. c.38, §§1-7, 2-7, 2-11 (1965)
Iowa:	Iowa Code Ann. §§687.2, 687.3, 687.4 (1950)
Kansas:	Kan. Stat. Ann. §§21-112, 62-104 (1964)
Maine:	Me. Rev. Stat. Ann. tit. 15, §§1703, 1791 (1964); *Ex parte Gosselin,* 41 Me. 412, 44 A.2d 882 (1945)
Minnesota:	Minn. Stat. Ann. §609.105 (1964)
Missouri:	Mo. Ann. Stat. §556.020, 556.040 (1953)
Nevada:	Nev. Rev. Stat. §§193.130, 193.140, 193.150 (1967)
New Hampshire:	N.H. Rev. Stat. Ann. §§607:9, 607:11 (1955)
New Mexico:	N.M. Stat. Ann. §§40A-29-3, 40A-29-4 (1964)
New York:	N.Y. Penal L. §70.20 (1967)
North Dakota:	N.D. Cent. Code Ann. §§12-06-10, 12-06-14 (1960)
Ohio:	Ohio Rev. Code Ann. §§1.05, 1.06 (1969); §§2949.08, 2949.12 (1954)
Oklahoma:	Okla. Stat. Ann. tit. 21, §§5, 6 (1961); *State* v. *Young,* 20 Okla. Crim. 383, 203 Pac. 484 (1922)
Oregon:	Ore. Rev. Stat. §161.030 (1965)
South Dakota:	S.D. Comp. L. §§22-1-4, 22-6-1, 22-6-2 (1967)

Tennessee:	Tenn. Code Ann. §§39-104, 39-105 (1955)
Virginia:	Va. Code Ann. §18.1-6 (1968)
Washington:	Wash. Rev. Code Ann. §9.01.020 (1967)
West Virginia:	W.Va. Code Ann. §61-11-1 (1966)
Wyoming:	Wyo. Stat. Ann. §6-2 (1957)

III. Right Not to Be Prosecuted Except by Grand Jury Indictment for Crimes Punishable by More Than One Year's Imprisonment

While almost every state has a procedure for indictment or presentment by a grand jury, in most states there is no right not to be held to answer for crimes without an indictment or presentment. However, in almost every state (including New York) which provides that right, and in the federal system, the cutoff for crimes that may be prosecuted without a right to accusation by a grand jury is a maximum sentence of one year's imprisonment.

United States:	Fed. R. Crim. Proc. 7(a)
Alaska:	Alaska Const. Art. I §8 (1959); *State* v. *Shelton*, 368 P.2d 817, 818 (1962) (follows federal law)
Georgia:	*Webb* v. *Henlery*, 209 Ga. 447, 74 S.E. 2d 7 (1953); *Perry* v. *State*, 54 Ga. 410, 187 S.E. 895 (1936)
Illinois:	Ill. Const. art. I, §8; Ill. Rev. Stat. c.38, §1-7(f) (1965); *Brewster* v. *People*, 183 Ill. 143, 55 N.E. 640 (1900)

Maine:	Me. Rev. Stat. Ann. tit. 4, §165; tit. 15 §§451, 701, 1703 (1964); *Ex parte Gosselin,* 41 Me. 412, 44 A.2d 882 (1945); *Smith* v. *State,* 145 Me. 313, 75 A.2d 538 (1950).
New Hampshire:	N.H. Rev. Stat. Ann. §§594:1, 601:1 (1955)
New York:	N.Y. Const. art. I, §§2, 6, art. VI, 618; *People* v. *Bellinger,* 269 N.Y. 265 (1935)
Virginia:	Va. Code Ann. §19.1-162 (1960)
West Virginia:	W. Va. Const. art. 3, §4; W. Va. Code Ann. §§52-2-7, 62-2-1 (1967)
Wyoming:	Wyo. Const. art. I, §§9, 13; Wyo. Stat. Ann. §§6-2, 6-6, 6-7 (1957)

IV. Typical Collateral Consequences of Conviction of Crimes Punishable by More Than One Year's Imprisonment

Disenfranchisement:

Forty-two states have provision for disenfranchising convicted felons. *Green* v. *Board of Elections,* 380 F.2d 445, 450 (2d Cir. 1967), *cert. denied* 389 U. S. 1048 (1968). In twenty-six of these states, including New York, felonies are punishable by more than one year's imprisonment, misdemeanors by up to one year's imprisonment (Appendix AI, *supra*).

Appendix A

Disqualification from Holding Public Office and Office of Honor and Trust:

Such disqualifications are prescribed in the federal system and ten states, including New York, for conviction of felonies punishable by more than one year's imprisonment. 18 U.S.C. §201; Cal. Const. art. XX, §11; Col. Stat. Ann. §§39-10-17, 39-10-18; Hawaii Sess. Laws A. 250 (1969); Iowa Code §66.1; Kansas 1969 Sess. Laws, c.18, §21-4615 (eff. July 1, 1970); Mo. Ann. Stat. §§129.420, 557.490, 558.-130, 559-470; N.M. Stat. Ann. §40A-29-14; N.Y. Civil Rts. Law §79; Ohio Rev. Code §2961.01; Ore. Rev. Stat. §137-250.

Divorce:

Conviction of a felony is a ground for divorce in almost every state. BOARDMAN'S N.Y. FAMILY LAW, Chart of Divorce Law (1967).

APPENDIX B

COLLATERAL CONSEQUENCES IN NEW YORK OF CONVICTIONS OF AN OFFENSE

I. Convictions of any Felony

a. Mandatory forfeitures or disabilities:

Right to register for or vote at any election [ELEC. LAW §152]

Forfeiture of all public offices [CIV. RTS. LAW §79]

Supension of all civil rights [CIV. RTS. LAW §79]

Supension of private trusts, powers and authorities [CIV. RTS. LAW §79]

Disbarment of attorneys [JUDI. LAW §90(4)]

Service on a New York jury [JUDI. LAW §§504(6), 596(4), 662(4)]

Ineligibility for civil certification as a narcotic addict under the Narcotic Addiction Control Program [MENTAL HEALTH LAW §210(2)]

Denial of the following professional licenses: physicians, osteopaths, physiotherapists, veterinarians, pharmacists [EDUC. LAW §§6502, 6702, 6804]

Denial of a license to operate a billiard room [GEN. BUS. LAW §461]

Denial of a license to operate a watch, guard or patrol agency [GEN. BUS. LAW §74(2)]

Denial of a license to work as a junk dealer or private investigator [GEN. BUS. LAW §§60, 74(2)]

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Denial, revocation or suspension of licenses for the following occupations or activities: pier superintendents, hiring agents, stevedores, port watchmen, checkers, solicitors for union dues [UNCONSOL. LAWS §§9814(b), 9818, 9821(e), 9824, 9841, 9844, 9918, 9933 (McKinney 1961)]

Denial of a license to carry firearms [PEN. LAW §400.00]

Denial of a license to work as a professional bondsman [INS. LAW §331; CODE CRIM. PROC. §554-b]

b. Discretionary forfeitures:

Revocation or suspension of the following licenses or certifications: physicians, osteopaths, physiotherapists, dentists, dental hygienists, pharmacists, nurses, podiatrists, optometrists, professional engineers, land surveyors, architects, landscape architects, certified public accountants, psychologists, certified social workers, civil service employment [EDUC. LAW §§6514, 6612, 6804, 6911, 7011, 7018, 7210, 7308, 7327, 7406, 7607, 7707; CIV. SERV. LAW §50(4)]

II. Conviction of any Misdemeanor

a. Mandatory forfeitures:

Denial of a license to work as a professional bondsman [INS. LAW §331; CODE CRIM. PROC. §554-b]

b. Discretionary forfeitures:

Disbarment of attorneys [*In re Hughes*, 188 App. Div. 520 (1st Dept. 1919)]

Appendix B

Revocation or suspension of the following licenses or certifications: physicans, osteopaths, physiotherapists, optometrists, certified public accountants, civil service employment [EDUC. LAW §§6514, 7108, 7406; CIV. SERV. LAW §50(4)]

III. Conviction of Certain Misdemeanors or Violations

a. Mandatory forfeitures:

Service on a New York jury [JUDI. LAW §§504(6), 596(4), 662(4)] (misdemeanors involving moral turpitude)

Denial of licenses to work as private investigators or to operate watch, guard or patrol agencies [GEN. BUS. LAW §74(2)] (illegal possession of dangerous weapons, burglar's tools, stolen property or narcotic drugs, unlawful entry of a building, aiding escape from prison, jostling, fraudulent accosting, loitering for the purpose of engaging or soliciting another person to engage in deviate sexual behavior, eavesdropping)

Denial of licenses to work as junk dealers [GEN. BUS. LAW §60] (larceny or knowingly receiving stolen property)

Denial, revocation or suspension of licenses to engage in the following occupations or activities: pier superintendents, hiring agents, stevedores, port watchmen, checkers, solicitors for union dues [UNCONSOL. LAWS §§9814(b), 9818, 9821(e), 9824, 9841, 9844, 9912, 9913, 9918, 9933 (McKinney 1961)] ("high misdemeanors", illegal possession of a dangerous weapon, burglar's tools or narcotics, buying

or receiving stolen property, unlawful entry of a building, aiding escape from prison, coercion, any crime or offense relating to gambling, bookmaking, pool selling or lotteries if committed at or on a pier or other waterfront terminal or within 500 feet thereof)

Denial of a license to carry firearms [PEN. LAW §400.00; CODE CRIM. PROC. §552] (illegal possession or use of a dangerous weapon, possession of burglar's tools, criminal possession of stolen property, escape, jostling, fraudulent accosting, loitering for the purpose of engaging or soliciting another person to engage in deviate sexual behavior, endangering the welfare of a child, obscenity and related offenses, issuing abortional articles, permitting or promoting prostitution, any sex offense, any drug offense)

b. Discretionary forfeitures:

None

IV. Other

a. Mandatory forfeitures:

Denial of pharmacist's license [EDUC. LAW §6804] (gross immorality)

Denial of a license to carry firearms [PEN. LAW §400.00] (lack of good moral character)

Denial of a license to work as a professional bondsman [INS. LAW §331; CODE CRIM. PROC. §554-b] (lack of good character or conviction of any offense)

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b. Discretionary forfeitures:

Revocation or suspension of the following professional licenses: dentists, dental hygienists, pharmacists, nurses [EDUC. LAW §§6612, 6804, 6911] (gross immorality)

The following occupational and business licensing provisions require that an applicant be of "good character" before a license will issue:

Exhibitions and performances [N.Y.C. ADM. CODE §B-32-10.0]; motion picture theatre licenses [*Id.* §B-32-25.0]; billiard and pool table licenses [*Id.* §B-32-45.0]; bowling alleys [*Id.* §B-32-46.0]; shooting galleries [*Id.* §B-32-47.0]; miniature golf courses [*Id.* §B-32-48.0]; sidewalk stands [*Id.* §B-32-59.0]; sightseeing guides [*Id.* §B-32-75.0]; public cartmen [*Id.* §B-32-92.0]; expressmen [*Id.* §B-32-97.0]; public porters [*Id.* §B-32-106.0]; junk dealers [*Id.* §B-32-114.0]; auctioneers [*Id.* §B-32-138.0]; laundries [*Id.* §B-32-167.0]; locksmiths [*Id.* §B-32-182.0]; massage operators [*Id.* §B-32-193.0]; bathing establishments [*Id.* §B-32-197.0]; rooming houses [*Id.* §B-32-219.0]; garages and parking lots [*Id.* §B-32-250.0]; commercial refuse removal [*Id.* §B-32-267.0]; coffee houses [*Id.* §B-32-310.0]; public dance halls, cabarets and catering establishments [*Id.* §B-32-296.0].

APPENDIX C

SURVEY OF PROVISIONS FOR JURY TRIAL

I. No Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Imprisonment for a Maximum of One Year

(a) Fewer than twelve jurors

The following nine states provide a jury of fewer than twelve persons for the trial of criminal offenses carrying a maximum penalty of one year. The constitutional right to a jury trial has been held to require a jury of twelve persons. Patton v. United States, 281 U. S. 276, 288, 290 (1930); Maxwell v. Dow, 176 U. S. 581, 586 (1900); Thompson v. Utah, 170 U. S. 343, 349, 350, 353 (1898); Rasmussen v. United States, 197 U. S. 516 (1905); People ex rel. Frank v. McCann, 253 N.Y. 221, 225-226 (1930); People ex rel. Eckler v. Clark, 23 Hun. 374, 376 (1881); People ex rel. Murray v. Justices, 74 N.Y. 406 (1878); People ex rel. Comaford v. Dutcher, 83 N.Y. 240 (1880).*

Alaska: CONSTITUTION, Art. I, §11; ALASKA STAT. ANN., §§11.75.030, 22.15.060, 22.15.150 (1962) (Jury of six in district magistrate's courts, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment).

Georgia: CONSTITUTION, Art. I, §2-105, Art. VI, §2-5101, Art. VII, §2-3601; GA. CODE ANN. §26-101, 27-2506 (1965); GA. LAWS 1890-91, pp. 935, 939 (In county criminal courts, which have jurisdiction of misdemeanors—cases in which the maximum sentence imposable is a fine of up to $1000 or imprisonment for a term of up to twelve months or both

* In five other states—Florida, Louisiana, South Carolina, Texas and Utah—juries of fewer than twelve persons are authorized in trials of offenses punishable by more than one year's imprisonment.

—a defendant may demand a jury trial. Depending upon the county, however, a jury ranges in size from five to twelve persons. The Criminal Court of Atlanta, for example, tries misdemeanors with juries of five. In Hall County the same crimes are tried by juries of twelve).

Iowa: CONSTITUTION, Art. 1, §§9, 10; IOWA CODE ANN., §§602.15, 602.25, 602.39, 687.7 (1950) (Jury of six in municipal courts, which have jurisdiction of misdemeanors, carrying a maximum fine of $500 or imprisonment for one year or both).

Kentucky: CONSTITUTION, §§7, 11, 248; KY. REV. STAT. ANN., §§25.010, 25.014, 26.400, 29.015 (1963) (Misdemeanors, carrying a maximum penalty of $500 or twelve months' imprisonment, are tried in inferior courts by a jury of six).

Mississippi: CONSTITUTION, Art. 3, §31, Art. 6, §171; MISS. CODE ANN. §§1831, 1836, 1839 (Crimes punishable in the county jail are tried in the justice of the peace courts by a six-man jury. Many such crimes have a one-year maximum term. Such crimes include, *e.g.*, offenses involving corruption in elections [MISS. CODE ANN. §§2031, 2032, 2114], escape or aiding escape of prisoners [§§2133, 2134, 2135, 2141], public officers' interest in contracts [§§2301, 2302], and trade marks [§§2390, 2391].

New York: CONSTITUTION, Art. 1, §2, Art. 6, §18; N.Y. CODE CRIM. PROC., §§701, 702, 710 (In counties outside New York City, a defendant may demand a jury of six for the trial of misdemeanors, which are punishable by up to one year's imprisonment); see Proposed N.Y. CONST. art. I, §76 (defeated at referendum Nov. 7, 1967) (extending six-man juries to misdemeanor cases in New York City).

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Oklahoma: CONSTITUTION, Art. 2, §§19, 20; OKLA. STAT. tit. 11, §§958.3, 958.6, tit. 21, §10 (1961) (Jury of six in the county courts and other courts not of record, which have jurisdiction of misdemeanors, carrying a maximum penalty of one year's imprisonment).

Oregon: CONSTITUTION, Art. I, §11; CONSTITUTION (orig.) Art. VII, §12; ORE. REV. STAT., §§5.110 (Supp. 1967), 46.040, 46.175, 46.180 (1967) (Jury of six in county courts, which have jurisdiction of all crimes except those carrying the death penalty or life imprisonment. Jury of six in district courts, which have jurisdiction of all misdemeanors, punishable by one year's imprisonment).

Virginia: CONSTITUTION, Art. I, §8; VA. CODE ANN. §§16.1-123, 16.1-124, 16.1-126, 16.1-129, 16.1-132, 16.1-136 (1956), 18.1-6, 18.1-9 (1961), 19.1-206 (1960). (In courts not of record, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment, charges are tried without a jury. The defendant may appeal as of right to the circuit court, where he receives a trial *de novo*. All trials in the circuit court of offenses not felonious, whether in the first instance or on appeal, are with five jurors.)

(b) Nonunanimous verdict

One state authorizes nonunanimous jury verdicts in criminal cases in which a maximum sentence of imprisonment of one year may be imposed. The constitutional right to a jury trial has consistently been held to require*

* In three states, Louisiana, Texas and Oregon, nonunanimous verdicts are authorized in cases in which imprisonment for longer than one year is authorized.

unanimity in the verdict. *Andres* v. *United States,* 333 U. S. 740, 748 (1948); *Patton* v. *United States,* 281 U. S. 276, 288-290 (1930); *Thompson* v. *Utah,* 170 U. S. 343, 347, 350, 353 (1898); *Maxwell* v. *Dow,* 176 U. S. 581, 586 (1900); see *Comment, Should Jury Verdicts be Unanimous in Criminal Cases?* 47 ORE. L. REV. 417 (1968).

Oklahoma: CONSTITUTION, Art. 2, §§19, 20; OKLA. STAT. tit. 11, §§958.3, 958.6, tit. 21, §10 (1961) (In misdemeanor cases—those in which a sentence of up to one year's imprisonment may be imposed—in courts of record, a defendant may demand a jury of twelve; nine members of the jury may render a verdict. For the same crimes tried in courts not of record, the defendant may demand six jurors, five of whom may render a verdict).

(c) No jury trial of any kind unless defendant is first found guilty without a jury

The following five states authorize trials, without a jury, of all offenses carrying a maximum penalty of one year's imprisonment, but the defendant may appeal to a higher court where he is entitled to a common law jury (four states) or a jury of five (one state) upon his trial* de novo. *Thus, only persons found guilty are entitled to a jury trial. The Supreme Court has held that the Sixth Amendment guarantee of a jury trial requires a jury trial "from the first moment," and that a provision for a jury*

* In four other states—Maryland, Massachusetts, North Carolina and Pennsylvania (Philadelphia)—certain offenses punishable by more than one year's imprisonment are tried without a jury in the first instance, and a jury of twelve is available on appeal at a trial *de novo.*

trial de novo *is void. Callan* v. *Wilson,* 127 U. S. 540, 557 (*1888*).

Arkansas: CONSTITUTION, Art 2, §§7, 10; ARK. STAT. ANN. §§22-709, 22-737, 26-301, 26-608, 26-612, 26-620, 41-106, 43-1901, 43-1902, 43-2160, 44-210, 44-509 (1964) (No jury provided in municipal courts, which have jurisdiction of misdemeanors carrying a maximum penalty of one year's imprisonment. Upon conviction, the defendant may appeal to the circuit court where he is entitled to a trial *de novo* before a common law jury).

Maine: CONSTITUTION, Art I, §§6, 7; ME. REV. STAT. ANN. tit. 4, §152 (Supp. 1968), tit. 15, §§1, 451 (1965); ME. R. CRIM. P. 23(b), 31(a); *Sprague* v. *Androscoggin,* 104 Me. 352, 71 Atl. 1908 (1908); letter dated December 17, 1968, from Maine Attorney General's office to New York County District Attorney's office (Maine district courts try misdemeanors—crimes punishable by a sentence of up to one year—without a jury. A defendant may appeal his conviction to the Superior Court, however, where he is entitled to a common law jury).

New Hampshire: CONSTITUTION, Pt. 1, Arts. 15, 16, Pt. 2, Art. 77; N.H. REV. STAT. ANN. §599:1 (Supp. 1967), §§502-A:11, 502-A:12, 502-18 (1968) (District and municipal courts try, without a jury, misdemeanors, carrying a maximum term of imprisonment of one year. The defendant in these courts has an absolute right of appeal to the Superior Court where he may demand a jury of twelve in his trial *de novo*).

Rhode Island: CONSTITUTION, Art. 1, §§10, 15; R.I. GEN. LAWS §§9-10-12, 12-3-1, 12-17-1, 12-22-1, 12-22-9 (1956); *State* v. *Nolan*, 15 R.I. 529, 10 Atl. 481 (1887). (There are no juries in the district courts, which have jurisdiction of misdemeanors—crimes punishable by a fine of up to $500 or imprisonment for up to one year or both. A defendant may appeal his conviction to the Superior Court where he is entitled to a trial *de novo* before a jury of twelve).

Virginia: CONSTITUTION, Art. I, §8; VA. CODE ANN. §§16.1-123, 16.1-124, 16.1-126, 16.1-129, 16.1-132, 16.1-136 (1956), 18.1-6, 18.1-9 (1961). (In courts not of record, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment, charges are tried without a jury. The defendant may appeal as of right to the circuit court, where he receives a trial *de novo* with five jurors).

(d) Trial by the court alone, with no jurors at any stage

New York: CONSTITUTION, Art. 1, §2, Art. 6, §18; N.Y.C. CRIM. CT. ACT, §40.

CONTEMPT CASES, IMPRISONMENT FOR ONE YEAR*:

Kansas: KAN. GEN. STAT. ANN. §§20-1204, 21-111 (1964).

North Dakota: N. D. CENT. CODE ANN. §§5-01-22 (1960), 42-02-10 (1968).

South Dakota: S. D. CODE §§13.0607, 13.1235 (1939), 33.3703 (Supp. 1960).

* In *Bloom* v. *Illinois*, 391 U.S. 194, 210 (1968), the Court decided "to treat criminal contempt like other crimes insofar as the right to jury trial is concerned."

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II. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Maximum Imprisonment of Six Months

Arizona: CONSTITUTION, Art. 2, §§23, 24; ARIZ. REV. STAT. §§12-123, 21-102, 21-103, 22-220, 22-301, 22-320, 22-371, 22-374, 22-402, 22-425; ARIZ. R. CRIM. PROC. 228, 300 (jury of six in lower courts for crimes punishable by no more than six months' imprisonment, with trial *de novo* before twelve jurors on appeal; jury of twelve in superior court for crimes punishable by more than six months).

Idaho: CONSTITUTION, Art. 1, §§7, 13; IDAHO CODE ANN. §§1-1406, 18-113 (1948), §2-105 (Supp. 1967).

Montana: CONSTITUTION, Art. 3, §§16, 23, Art. 8, §11; MONT. REV. CODE ANN. §§11-1602, 11-1603, 11-1702 (1957), 94-116 (1964); MONT. CODE CRIM. PROC. §§95-302, 95-303, 95-1901(c), 95-1905, 95-1915(a), 95-2004, 95-2005, 95-2006 (1968).

New Jersey: CONSTITUTION, Art. 1, pars. 9, 10; N. J. STAT. ANN. §§2A:3-4, 2A:3-5, 2A:74-1, 2A:74-2, 2A:169-4, *as amended,* ch. 113 [1968] N. J. Laws 315.

New Mexico: CONSTITUTION, Art. II, §§12, 14; N.M. STAT. ANN. §§36-3-4, 36-10-1, 36-10-2, 36-10-3, 36-10-4, 40A-1-11, 40A-29-1 to -23 (1968).

Washington: CONSTITUTION, Art. I, §§21, 22; WASH. REV. CODE ANN. §§2.36.050, 3.20.040, 10.49.020 (1961), 3.50.020, 3.50.280, 3.50.410, 3.66.010, 3.66.060 (Supp. 1967).

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III. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Maximum Imprisonment of 90 days

Michigan: CONSTITUTION, Art. I, §§14, 20; MICH. COMP. LAWS ANN. §§730.264, 730.267, 730.412, 730.551 (jury of six in justice courts for crimes punishable by no more than three months' imprisonment, followed by trial *de novo* on appeal to the circuit court; jury of twelve in other cases).

Nebraska: CONSTITUTION, Art. I, §§6, 11, Art. V, §§16, 18; NEB. REV. STAT. ANN. §§18-205 (1962), 29-603, 29-604, 29-605 (1964), 29-601 (Supp. 1967).

IV. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Maximum Imprisonment of 30 days

Connecticut: CONSTITUTION, Art. 1, §§8, 19; CONN. GEN. STAT. ANN. §§51-266, 54-82 (1968).

Hawaii: CONSTITUTION, Art. I, §11, HAWAII REV. LAWS, §§231-9, 247-2 (1955), 216-7 (Supp. 1965); *Territory* v. *Kiyoto Taketa*, 27 Haw. 844, 847-849 (1924).

V. Common Law, Sixth Amendment Jury Trial for Offenses Punishable by Any Imprisonment

Alabama: CONSTITUTION, Art. 1, §§6, 11; ALA. CODE ANN. tit. 7, §264, tit. 13, §§126, 417, 423, 424, 429 (1968), 428 (Supp. 1967), tit. 15, §§321, 327 (1958); *Collins* v. *State*, 88 Ala. 212, 7 So. 260 (1890).

California: CONSTITUTION, Art. I, §7; CAL. PENAL CODE ANN. §§689, 1042 (1956), §190 (1968); *Ex parte Wong Yun Ting*, 106 Cal. 296, 39 Pac. 627 (1895).

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Colorado: CONSTITUTION, Art. II, §§16, 23; COLO. REV. STAT. ANN. §78-7-4 (1963); COLO. R. CRIM. P. 1, 23(b), 54, 123(b), 131(a).

Delaware: CONSTITUTION, Art. I, §§4, 7, Art. 4, §30; DEL. CODE ANN. tit. 11, §5901 [the Delaware Attorney General's Office reports that as of February, 1969, defendants may elect to be tried by a jury of twelve in all cases].

Illinois: CONSTITUTION, Art. II, §§5, 9; ILL. ANN. STAT. c. 38, §103-6, c. 78, §§20, 23 (1965); *People* v. *Lobb*, 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

Indiana: CONSTITUTION, Art. I, §13; IND. STAT. ANN. §§9-713, 9-1501 (1956), 4-303, 4-5904 (1968); *Alldredge* v. *State*, 239 Ind. 256, 156 N.E.2d 888 (1959).

Kansas: CONSTITUTION, BILL OF RIGHTS, §§5, 10; KAN. STAT. ANN. §§62-1401, 62-1412, 62-1501, 63-302 (1964).

Minnesota: CONSTITUTION, Art. 1, §§4, 6; MINN. STAT. ANN. §§593.01, 633.12 (1947), 609.095-.165 (1964); *State* v. *Everett*, 14 Minn. 439 (Gil. 330) (1869).

Missouri: CONSTITUTION, Art. I, §§18(a), 22(a); MO. ANN. STAT. §§543.010, 543.200, 543.210, 543.250, 546.390 (1953).

Nevada: CONSTITUTION, Art. I, §3; NEV. REV. STAT. §§4, 370, 175.011, 175.021, 175.481, 266.540, 266.550, 266.555 (1967).

North Dakota: CONSTITUTION, Art. I, §§7, 13; N.D. CENT. CODE ANN. §§29-01-06, 29-17-12, 33-12-19, 33-12-25 (1960), 40-18-15, 40-18-16, 40-18-17 (Supp. 1968).

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Ohio: CONSTITUTION, Art. I, §§5, 10; OHIO REV. CODE ANN. §§2931.11, 2938.06, 2945.17 (1954), 1913.09, 2945.77 (Supp. 1966).

South Dakota: CONSTITUTION, Art. VI, §§6, 7; S.D. COMP. L. §§23-2-4, 23-53-4, 23-54-9, 23-56-5 (1957); *City of Sioux Falls* v. *Fanebust*, 72 S.D. 54, 29 N.W.2d 472 (1947).

Tennessee: CONSTITUTION, Art. I, §§6, 8, 9; TENN. CODE ANN. §§39-105, 40-2001 (1955), 40-2054 (Supp. 1968); *Memphis* v. *Trigally*, 46 Tenn. 382 (1869); *Woods* v. *State*, 99 Tenn. 182, 41 S.W. 811 (1897); *Willard* v. *State*, 175 Tenn. 642, 130 S.W.2d 99 (1939).

Vermont: CONSTITUTION, c. I, Arts. 10, 12; VT. STAT. ANN. tit. 12, §1505, tit. 13, §1 (1958); *State* v. *Hirsch*, 91 Vt. 330, 100 Atl. 877 (1916).

West Virginia: CONSTITUTION, Art. 3, §14; W. VA. CODE ANN. §50-18-7 (1966).

Wisconsin: CONSTITUTION, Art. I, §§5, 7; WIS. STAT. ANN. §§957.01 (Supp. 1967), 959.01 (1963); *Rothbauer* v. *State*, 22 Wis. 468 (1868); *State* v. *Gollmar*, 32 Wis.2d 406 (1966), 145 N.W.2d 670; *State* v. *Voss*, 34 Wis. 2d 501, 149 N.W.2d 595 (1967).

Wyoming: CONSTITUTION, Art. 1, §§9, 10, Art. 5, §§10, 22; WYO. STAT. ANN. §§5-123, 5-130, 5-133, 5-135, 7-409, 7-420, 7-427, 7-448 (1957); *Jarvis* v. *Brown*, 256 Pac. 336 (Wyo. 1927).

APPENDIX D

CRIMINAL COURT OF THE CITY OF NEW YORK

Case Load and Trials*

I

1968 Case Load

	Arraigments	*Dispositions***
Misdemeanors—non-traffic	112,699	109,035
Misdemeanors—traffic	144,603	65,233
Violations—non-traffic non-intoxication	176,582	135,800
Violations—public intoxication	9,186	9,049
Total	443,070	319,117

* Source: Records of the Director of Statistics of the Criminal Court of the City of New York. The Criminal Court also holds arraignments and preliminary hearings in felony cases, and all proceedings in traffic violation cases. These cases are not included herein.

** Includes cases from prior years.

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II

1968 Trials

	Trials to Verdict	*Verdict of Conviction After Trial*	*Verdict of Acquittal After Trial*
Misdemeanors—non-traffic	9,328	5,059	4,269
Misdemeanor—traffic	2,747	1,218	1,529
Violations—non-traffic non-intoxication	9,206	5,935	3,271
Violations—public intoxication	114	33	81
Total	21,395	12,245	9,150

APPENDIX E

Dispositions of Non-Traffic Misdemeanor Cases by Courts of Inferior Jurisdiction in New York State*

County	*1960 Population*	*Number of Dispositions 1960*	*1966*
Total N. Y. City	7,781,984	119,878	140,667
Total Outside N.Y. City	9,000,320	29,059	38,266
Albany	272,926	688	993
Allegany	43,978	112	112
Broome	212,661	380	428
Cattaraugus	80,187	310	323
Cayuga	73,942	196	494
Chautauqua	145,377	353	538
Chemung	98,706	279	314
Chenango	43,243	163	210
Clinton	72,722	167	222
Columbia	47,322	159	199
Cortland	41,113	79	132
Delaware	43,540	126	140
Dutchess	176,008	717	1,046
Erie	1,064,688	4,415	3,533
Essex	35,300	119	120

* Source of upstate statistics: Division of Research, N.Y.S. Department of Correction, Mr. Alexander Barraco, Director.

Source of N.Y.C. statistics: For 1960 figures, 1960 Annual Report of the Court of Special Sessions of the City of New York, Table I; 1960 Annual Report of the Magistrates' Courts of the City of New York, Table I. For 1966 figures, 1966 Annual Report of the Criminal Court of the City of New York, Table I.

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County	*1960 Population*	*Number of Dispositions 1960*	*1966*
Franklin	44,742	125	125
Fulton	51,304	62	85
Genesee	53,994	127	165
Greene	31,372	42	113
Hamilton	4,267	9	4
Herkimer	66,370	131	130
Jefferson	87,835	282	311
Lewis	23,249	45	38
Livingston	44,053	161	257
Madison	54,635	171	246
Monroe	586,387	2,025	2,571
Montgomery	57,240	80	68
Nassau	1,300,171	3,703	4,353
Niagara	242,269	1,065	1,017
Oneida	264,401	659	652
Onondaga	423,028	1,295	1,568
Ontario	68,070	143	238
Orange	183,734	543	823
Orleans	34,159	141	111
Oswego	86,118	235	182
Otsego	51,942	113	133
Putnam	31,722	65	110
Rensselaer	142,585	377	540
Rockland	136,803	342	478
St. Lawrence	111,239	331	346
Saratoga	89,096	151	205
Schenectady	152,896	354	397

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County	*1960 Population*	*Number of Dispositions 1960*	*1966*
Schoharie	22,616	38	64
Schuyler	15,044	53	78
Seneca	31,984	64	83
Steuben	97,691	247	357
Suffolk	666,784	2,056	6,448
Sullivan	45,272	223	432
Tioga	37,802	77	84
Tompkins	66,164	167	215
Ulster	118,804	407	650
Warren	44,002	146	248
Washington	48,476	95	122
Wayne	67,989	271	269
Westchester	808,891	4,019	5,024
Wyoming	34,793	102	73
Yates	18,614	54	49